92-1241

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,

v.

REUBEN S. POOL, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Texas

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against Owens-Illinois made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), violated Owens-Illinois' procedural due process rights?

2. Whether multiple awards of punitive damages against Owens-Illinois for a single course of conduct that ended 35 years ago violate Owens-Illinois' procedural and substantive due process rights?

PARTIES AND RULE 29.1 STATEMENT

Defendants

Fibreboard Corporation
Celotex Corporation
The Flintkote Company
H.K. Porter Company, Inc.
Garlock, Inc.

Plaintiffs in Civil Action No. 86-363

Reuben S. Pool
Lee Pool
Charles Strong
Nancy Strong
Thomas Sledge
Betty Sledge
Bobbie Freeman
Donna Freeman
Ollie Freeman

Plaintiffs in Civil Action No. 88-08-293

Lessie L. Williams
Ralph E. Williams
Robert E. Williams
Carrol A. Purdy
Murry W. Williams
Cindy L. Powdrill
Bobbie S. Phillips
Emory G.L. Williams
Patsy R. Fountain

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Owens-Illinois de Puerto Rico
Cisper Industria e Comercio, S.A.
Companhia Industrial Sao Paulo e Rio

Cristaleria Peldar, S.A.
Andividrios, S.A.
Cristaleria del Ecuador, S.A.
Fabrica de Vidrio Los Andes, C.A.
Manufacturera de Vidrios Planos, C.A.
Owens-Illinois de Venezuela, C.A.

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v.

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Petition for Writ of Certiorari to the Supreme Court of Texas

---

PETITION FOR A WRIT OF CERTIORARI

Owens-Illinois, Inc. ("Owens-Illinois") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas.

OPINIONS BELOW

The November 11, 1992 Order of the Supreme Court of Texas vacating its April 29 Order in this case and dismissing Owens-Illinois' application for a writ of error is included in the Appendix at A, 1a. That court's April 29, 1992 Order granting Owens-Illinois' application for writ of error is included in the Appendix at B, 3a-8a. The Order entered by the Supreme Court of Texas on December 9, 1992 denying Owens-Illinois' motion for rehearing is included in the Appendix at A, 2a. The opinion of the Court of Appeals of Texas in *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex. Ct. App. 1991), is included in the Appendix at C, 9a.

JURISDICTION

The Supreme Court of Texas entered its Order dismissing Owens-Illinois' writ of error on November 11, 1992, and denied Owens-Illinois' motion for rehearing on December 9, 1992. This Court has jurisdiction under 28 U.S.C.A. sec. 1257 (West Supp. 1992).

CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles and jars. Its involvement in the asbestos-related personal injury litigation stems from a single type of insulation material, which was sold under the name "Kaylo." Kaylo contained approximately 15% asbestos. Owens-Illinois first manufactured Kaylo in commercial quantities in the late 1940's, and it ceased all manufacture of this product in April 1958—35 years ago.

Today, because of this single type of product that it ceased making 35 years ago, Owens-Illinois is one of the defendants in tens of thousands of asbestos-related personal injury cases across the country.[1] The large majority of these cases include claims for punitive damages.

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[1] The Judicial Panel on Multidistrict Litigation has transferred the approximately 30,000 asbestos-related personal injury cases pending in federal court to Judge Charles Weiner of the U.S. District Court for the Eastern District of Pennsylvania. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). In those cases he has remanded for trial, or suggested to the Judicial Panel that it remand for trial, Judge Weiner has severed and retained in his court the claims for punitive damages for the reason that "the issue of punitive damages must be resolved

This petition arises from the claims of eighteen Plaintiffs: five of these Plaintiffs claimed occupational exposure to asbestos-containing products, and the remaining Plaintiffs are their spouses and families. The cases were consolidated and tried before Judge Donald R. Ross beginning on October 2, 1989 in the Fourth Judicial District Court of Rusk County, Texas. Along with Owens-Illinois, five other companies were defendants at trial.

On October 19, 1989 the jury returned its verdict finding all the defendants jointly and severally liable to each of the Plaintiffs, and awarding actual damages in the amount of $5,087,000 (which the trial court reduced to $4,075,299.50 to reflect settlements obtained from two other defendants). The jury also awarded thirteen of the Plaintiffs punitive damages in the total amount of $5,000,000. *See* Judgment, entered Nov. 1, 1989, at Appendix D, 76a. The jury assessed $1,200,000 in punitive damages against Owens-Illinois. (Pursuant to Texas law an award of punitive damages is apportioned among the defendants by the jury; joint and several liability does not apply. Tex. Civ. Prac. & Rem. Code Ann. § 41.004 (Supp. 1991).).

Owens-Illinois moved for new trial, based on the contention that the "[r]epeated imposition of punitive damages . . . violates the due process . . . provisions of the Federal and Texas Constitutions." Appendix E at 87a-88a. In support of this argument, Owens-Illinois submitted in affidavit of its Assistant Secretary, Michael E. McConnell, setting forth other awards of punitive damages assessed

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at a further date with regard to the entire MDL." *E.g.*, Suggestion of Remand, MDL-875 (E.D. Pa. Apr. 29, 1992); Transfer Order, MDL-875 (E.D. Pa. June 3, 1992). The Judicial Panel lacks statutory authority to transfer cases pending in state courts. Thus, while Judge Weiner has coordinated his efforts to promote settlement with many state judges, the transfer of the federal cases has not directly affected the tens of thousands of asbestos-related personal injury cases in state courts across the country. Owens-Illinois is a defendant in many of the state cases.

against Owens-Illinois for the same course of conduct at issue in the *Pool* case. Appendix F, 89a. The trial court summarily denied Owens-Illinois' motion, without addressing the due process issues presented by punitive damages, and without reflecting in the record its reasons for refusing to disturb the jury's verdict. Appendix G, 92a.

Owens-Illinois appealed the judgment in *Pool*, and in its briefs to the Texas Court of Appeals again argued that "due process precludes the imposition of additional punitive damages against Owens-Illinois in this case." Appendix H at 96a-97a. The Texas Court of Appeals rejected Owens-Illinois' constitutional arguments and affirmed the award of punitive damages. Appendix C at 57a. In doing so the court relied in part on this Court's then-recent decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), but did not apply the detailed, substantive factors approved in *Haslip*. Appendix C at 54a. Instead, the Court of Appeals cited the far less specific factors set out in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), and without discussing the *Kraus* factors individually concluded that the $1.2 million in punitive damages would not "shock the sense of mankind." Appendix C at 55a-56a.

Owens-Illinois filed a timely application for writ of error with the Supreme Court of Texas; on April 29, 1992, that court granted Owens-Illinois' application on, *inter alia*, the following point:

> The court of appeals erred in holding that the award of punitive damages against Owens-Illinois did not violate the due process clauses of the United States and Texas Constitutions and in holding that the award of punitive damages against Owens-Illinois was appropriate under Texas common law.

Appendix B at 7a.

In a Supplemental Brief submitted to the court Owens-Illinois argued that due process requires a "rational decisionmaking process to insure that the total amounts of

[punitive damages] awarded do not exceed that necessary for punishment and deterrence." Appendix I at 105a. Owens-Illinois also argued that multiple awards could not be justified on the grounds that the award in *Pool* represented punishment for only the harm done to the individual Plaintiffs in that case, since Plaintiffs' counsel and witnesses repeatedly emphasized to the jury that "thousands" of workers were harmed by exposure to asbestos. *Id.* at 103a-105a; *see also*, Appendix J-N, 108a-113a (relevant excerpts from trial transcript).

The Supreme Court of Texas heard oral argument in the case on September 29, 1992. On November 11, 1992, the court vacated its April 29 Order and dismissed Owens-Illinois' application for a writ of error. Appendix A, 1a. The court denied Owens-Illinois' motion for rehearing on December 9, 1992. Appendix A, 2a.

REASONS FOR GRANTING THE WRIT

A. The first question presented by Owens-Illinois' petition for certiorari is whether the award of punitive damages against Owens-Illinois made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), violated Owens-Illinois' procedural due process rights. This question is the same as that presented in the petition for certiorari recently granted by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992). Just as in *TXO Production*, this is a case where the courts of a state have affirmed a very substantial award of punitive damages without observing the *Haslip* procedures.

This Court's decision in *Haslip* approved the traditional measure of liability for an award of punitive damages in a case of fraud, and directed attention to constraints placed on the discretion of the fact finder through post-trial review procedures in Alabama. Because both the

trial and appellate courts in Alabama carefully measure any award for excessiveness by application of several "detailed substantive standards" that have "real effect" on jury awards in Alabama, this Court affirmed the *Haslip* award. *Haslip*, 111 S. Ct. at 1045. The Court determined that this review ensures that awards of punitive damages are not "greater than reasonably necessary to punish and deter," and therefore comport with due process. *Id.* at 1045-46.

Nothing consistent with *Haslip* happened in this case. The trial court failed to provide Owens-Illinois with a post-trial hearing on the excessiveness of the punitive damages award and did not state any reasons for affirming the award. *See Haslip*, 111 S. Ct. at 1044 (Alabama law allows trial court to consider new evidence of defendants' net worth, and requires court to "reflect in the record the reasons" for affirming the award). Instead, the court summarily and without explanation denied Owens-Illinois' post-trial motion. Appendix G, 92a.

On appeal, the Texas Court of Appeals affirmed the punitive damages judgment because the amount awarded "would [not] shock the sense of mankind." Appendix C at 56a. This is exactly the type of vague, wholly subjective standard that in *Haslip* this Court suggested would *not* satisfy due process. 111 S. Ct. at 1045 n.10. There the Court contrasted "the detailed substantive standards" used by the Alabama courts with the "shock the conscience" standard used in Mississippi and the "manifestly and grossly excessive" standard used in Vermont. The standard applied below—"shock the sense of mankind"—is neither detailed nor substantive. While it is true that the court below cited the five factors identified in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), it did not discuss these factors individually:

> The wrongful conduct was a failure to warn about the use of a product which could result in serious illness and death by suffocation, and we cannot con-

> clude that punitive damages of an approximately one-to-one ratio with actual damages are such that would *shock the sense of mankind.* In relationship to the actual damages and the nature of the wrong, *as well as the other factors,* the record supports the award of punitive damages.

Appendix C at 56a (emphasis added). (Owens-Illinois notes that other courts have found that its conduct was lawful and proper. *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 342-43 (6th Cir. 1985) (affirming denial of plaintiff's motion for directed verdict on alleged failure to warn, and affirming jury verdict in Owens-Illinois' favor); *Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 260 (Ct. Spec. App. Md. 1990) (concluding that evidence did not support award of punitive damages against Owens-Illinois), *aff'd in part and rev'd in part on other grounds*, 604 A.2d 445 (Md. 1992)).

Finally, the Texas Supreme Court refused to review the award—or the decisions of the trial and appellate courts—*at all*, much less under the substantive criteria announced in *Haslip*. Thus, unless this Court grants the writ of certiorari, Owens-Illinois will be punished by the imposition of punitive damages without the protection of any careful trial or appellate court review.

The courts that have followed the guidance provided in *Haslip* have demonstrated the effectiveness of careful post-trial review in controlling excessive punitive damages awards. *See, e.g., Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991) ($8,000,000 award of punitive damages reversed and remanded with directions to district court to "articulate its analysis . . . and to review the award under the criteria approved in *Haslip*"); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (district court's summary denial of post-trial motions did not meet *Haslip* due process standards in case involving $750,000 punitive damages award). In *Haslip*, this Court recognized that this system of post-trial review

provides "definite and meaningful constraint" on the discretion of the fact finder, thereby protecting defendants from the imposition of awards that are unconstitutionally excessive. The "review" of the award against Owens-Illinois by the trial and appellate courts in this case did not provide the necessary constraint on the jury's discretion, and therefore violates due process.

B. Owens-Illinois already has paid millions of dollars in punitive damages judgments, all of which arise out of the same course of conduct. That conduct ended in April, 1958, 35 years ago, when Owens-Illinois ceased making its single asbestos-containing product. Many juries, after hearing the evidence concerning this conduct, refuse to award punitive damages against Owens-Illinois. Other juries, including the jury in this case, have returned verdicts for punitive damages in very substantial amounts against Owens-Illinois. *See* Appendix F, 89a (Affidavit of Michael F. McConnell submitted to trial court).

In this case, as in many others, the courts treat the punitive damages awarded as punishment for the *entire course* of the defendant's supposedly wrongful conduct. The Court of Appeals below, for example, gave as one reason for affirming the verdict that "[t]he evidence . . . indicates that [an] unprecedented number of workers will die from asbestos-related cancer." Appendix C at 56a. In the trial court, Plaintiffs' counsel told the jury in his summation that "And these men died by the thousands, and there's going to be a bunch more of them. We're not through yet with the companies ignoring the danger and the risk. *That's why punitive damages.*" Appendix M, 112a (emphasis added). An expert witness for Plaintiffs testified that during the next half century "tens of thousands of workers will die of cancer" caused by occupational exposure to asbestos products. Appendix K, 109a; *see also* Appendix J, 108a; Appendix L, 110a; Appendix N, 113a.

As these statements show, the court and jury below saw themselves as engaged to mulct Owens-Illinois for

the effect of its conduct on all potential plaintiffs—not merely the Plaintiffs sitting in *that* courtroom. Their verdict for punitive damages was not tied to the injury alleged by just those Plaintiffs before them. The jury was invited to consider *all* potential plaintiffs, and the appellate court explicitly did so. Appendix C at 56a ("The evidence . . . indicates that [an] unprecedented number of workers will die from asbestos-related cancer."). When Owens-Illinois argued that multiple awards of punitive damages under these circumstances violated due process, that court replied that it could not "dictate policy in a mass tort context, but can only decide the cases involved in the present suit." Appendix C at 57a. It stated that such matters must be left to this Court, among others.

At least one court has justified repetitive awards of punitive damages on the grounds that each award represents only each plaintiff's share of the total amount of punitive damages necessary to punish defendant for a course of conduct. *See King v. Armstrong World Indus.*, 906 F.2d 1022, 1030 (5th Cir. 1990) (rejecting constitutional challenge to multiple awards of punitive damages since award "specifically targeted to [defendant's] conduct as it affected each plaintiff"), *cert. denied*, 111 S. Ct. 2236 (1991). Yet this reasoning assumes that the jury looks only to the plaintiffs sitting before them and limits punitive damages to any harm to those plaintiffs. This assumption is certainly inconsistent with the summation by Plaintiffs' counsel to the jury in this case, and Owens-Illinois submits that it is also inconsistent with the ordinary run of advocacy in most jury trials involving punitive damages. Juries are usually invited to consider an entire range of conduct by the defendant, and this invitation seems often to be accepted. Multiple awards of punitive damages for a single course of conduct cannot be justified as each plaintiff's *pro rata* share of the total amount necessary to punish and deter, where, as here and in so many asbestos cases, plaintiffs' counsel stresses

to the jury that the defendants were responsible for injuring thousands of workers, not just the plaintiffs to the case.

Due process, under the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), requires that the states provide a rational mechanism to take previous awards of punitive damages into account in considering whether yet another such award is excessive. In *Haslip* itself, this Court approved the consideration by the Alabama courts of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation." *Id.* at 1045. Furthermore, this Court approved the Alabama requirement that "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict' " for punitive damages. *Id.* at 1044 (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986)). Taken together, these two aspects of *Haslip*—the explicit consideration of prior awards, and a review on the record by the trial court of the amount of the verdict—would provide the rational mechanism required by due process.

TXO Production argues in its petition for a writ of certiorari that a single punitive damages award of $10,000,000 is excessive and therefore violates due process. In support of this argument, TXO Production points to the fact that the punitive damages award is 526 times greater than the amount of actual damages awarded. Pet. for a Writ of Cert. at 14, *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992) (No. 92-497).

The award of punitive damages in *Pool* demonstrates that the ratio of punitive to actual damages is not and cannot be the sole measure of excessiveness. In this case, the ratio of total punitive to actual damages is approximately 1:1. The award is excessive nonetheless, because Owens-Illinois already has paid several awards of punitive damages for the same course of conduct at issue here.

See, e.g., Johnson v. Celotex Corp., 899 F.2d 1281, 1288 (2d Cir.) ($1.8 million award of punitive damages), *cert. denied*, 111 S. Ct. 297 (1990); *Passentino v. Raymark Indus., Inc.*, No. 89-7855, slip op. (2d Cir. 1990) ($500,000); *In re New York City Asbestos Litig.*, 572 N.Y.S.2d 1006 (N.Y. App. Div. 1991) (consolidated cases resulting in award of punitive damages against Owens-Illinois); *Roby v. Owens-Illinois, Inc.*, No. 91-3081, slip op. (6th Cir. June 8, 1992) (punitive damages award of $250,000), *cert. denied*, 113 S. Ct. 411 (1992); *Bolyard v. Owens-Illinois, Inc.*, No. 91-3029, slip op. (W. Va. May 13, 1992) ($30,000), *cert. denied*, 113 S. Ct. 462 (1992). Due process requires that these repetitive awards be considered by the courts reviewing the award in *Pool* for excessiveness.

Multiple awards of punitive damages are a phenomenon of the latter half of this century, resulting from the advent of mass tort litigation. *See In re School Asbestos Litig.*, 789 F.2d 996, 1003-04 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 892 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). Courts consistently have responded to this recent development with expressions of profound concern that repetitive punishment violates due process. *See, e.g., King v. Armstrong World Indus.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (award of punitive damages in asbestos litigation affirmed with "misgivings" in view of the likelihood of " 'overkill,' " (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967)), *cert. denied*, 111 S. Ct. 2236 (1991); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by

victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. denied*, 459 U.S. 988 (1982); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction"); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act"), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

These opinions demonstrate that mass tort litigation, with its concomitant repeated claims for punitive damages, demands a uniform and rational decisionmaking process to ensure that a defendant is assessed only the amount of punitive damages necessary to punish and deter a single course of conduct. Without further guidance by this Court, courts lack the means necessary to weigh other awards with the confidence that awards (and litigants) in other states will be subject to the same process. *See Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (concluding that multiple awards of punitive damages violate due process but allowing award to stand since lack of nation-wide uniformity leaves court "powerless to fashion a remedy which will protect the due process right of the defendant").

This Court's decision in *Haslip* established as a matter of substantive due process that an award may not exceed the amount required to meet society's goals of deterrence and retribution, *Haslip*, 111 S. Ct. at 1044-45, and the petition filed by TXO Production asks the Court to provide "further guidance on the precise meaning of its holding [regarding excessiveness] in *Haslip*." Pet. for a Writ of Cert. at p. 17, *TXO Prod. Corp. v. Alliance Resources*

Corp., 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992) (No. 92-497).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 22, 1993

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-1376

FIBREBOARD CORPORATION, *et al.*

v.

REUBEN S. POOL and LESSIE L. WILLIAMS, *et al.*

From RUSK County, 6th District

November 11, 1992

The order of this Court of April 29, 1992, granting applications for writ of error on behalf of Fibreboard Corporation, Owens-Illinois, Inc., The Celotex Corporation, The Flintkote Company, and Garlock, Inc., is withdrawn as the applications for writ of error were improvidently granted.

After further consideration, the Court has determined that the applications for writ of error to the Court of Appeals for the Sixth District present no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that the applications be, and hereby are, denied.

It is further ordered that applicant, Fibreboard Corporation, applicant, Owens-Illinois, Inc., applicant, The Celotex Corporation, applicant, The Flintkote Company, and applicant, Garlock, Inc., pay all costs incurred on each respective application.

IN THE SUPREME COURT OF TEXAS

No. D-1376

FIBREBOARD CORPORATION, *et al.*

v.

REUBEN S. POOL and LESSIE L. WILLIAMS, *et al.*

From RUSK County, 6th District

December 9, 1992

Petitioners' separate motions for rehearing of applications for writ of error filed herein on November 30, 1992, on behalf of Fibreboard Corporation, Owens-Illinois, Inc., The Celotex Corporation, and Garlock, Inc., together with petitioner's, Owens-Illinois, Inc., supplement to motion for rehearing filed herein on December 2, 1992, and petitioner's Fibreboard Corporation, supplement to motion for rehearing filed herein on December 7, 1992, having been duly considered, it is ordered that said motions, as supplemented, be, and hereby are, overruled.

APPENDIX B

[Excerpt from Owens-Illinois, Inc.'s Application for Writ of Error]

No. D-1376

IN THE SUPREME COURT OF TEXAS

OWENS-ILLINOIS, INC., *et al.*,
Petitioners

v.

REUBEN S. POOL, *et al.*,
Respondents

APPLICATION FOR WRIT OF ERROR

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[Filed Aug. 29, 1991]

[GRANTED pts. 1, 2, 3, 4, 9]

[Set for Oral Argument on Tuesday 9-29-92]

[WITHDRAWN—IMPROVIDENTLY GRANTED]

[WRIT DENIED]

NAMES OF ALL PARTIES

The following is a complete list of the names of all parties to the trial court's final judgment:

Respondents	Petitioners
Charles Strong	The Celotex Corporation
Nancy Strong	Fibreboard Corporation
Thomas Sledge	Owens-Illinois, Inc.
Betty Sledge	The Flintkote Company
Reuben S. Pool	Garlock, Inc.
Lee Pool	
Lessie L. Williams	
Ralph E. Williams	
Robert E. Williams	
Carrol A. Purdy	
Murry W. Williams	
Cindy L. Powdrill	
Bobbie S. Phillips	
Emory G. L. Williams	
Patsy R. Fountain	
Bobbie Freeman	
Donna Freeman	
Ollie Freeman	

No. D-1376

IN THE SUPREME COURT OF TEXAS

OWENS-ILLINOIS, INC., *et al.*,

Petitioners

v.

REUBEN S. POOL, *et al.*,

Respondents

APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Owens-Illinois, Inc. ("Owens-Illinois") respectfully submits this application for writ of error to reverse the judgment rendered July 16, 1991 by the Court of Appeals for the Sixth District of Texas in cause no. 6-90-014-CV, *Fibreboard Corporation et al. v. Reuben S. Pool and Lee Pool et al.*, and cause no. 6-90-022-CV, *Fibreboard Corporation et al. v. Lessie L. Williams et al.* (consolidated).

In this application, Owens-Illinois and the other petitioners are identified as "defendants." The respondents are identified collectively as "plaintiffs." References to the record are abbreviated as follows: "S.F." (statement of facts), "Supp. S.F." (supplemental statement of facts), "Tr." (transcript), and "Exs." (exhibits). References to the opinion of the court of appeals, which that court ordered to be published, are abbreviated "Op."

To the extent they apply to it, Owens-Illinois adopts and incorporates herein the points of error set forth in the applications of the other defendants.

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COURT OF APPEALS OF TEXAS
TEXARKANA

Nos. 6-90-014-CV, 6-90-022-CV
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Appellants,

v.

REUBEN S. POOL and LEE POOL, *et al.*,
Appellees.

FIBREBOARD CORPORATION, *et al.*,
Appellants,

v.

LESSIE L. WILLIAMS, *et al.*,
Appellees.

July 16, 1991

Second Rehearing Overruled
Aug. 28, 1991

Edward J. Burke, Brobeck, Phleger & Harrison, San Francisco, Cal., David L. Tolin, Weller, Wheelus & Green, Beaumont, Tex., for Fibreboard.

Donald J. Verplancken, Butler & Binion, Kevin S. Risley, Houston, Tex., for Celotex Corp.

Joe R. Greenhill, Baker & Botts, Austin, Tex., Larry D. Carlson, Baker & Botts, Dallas, Tex., for Owens-Illinois.

James H. Harris, Jr., Holmes & Harris, Beaumont, Tex., for the Flintkote Co.

A.B. Conant, Jr., David M. Pruessner, Dallas, Tex., for Garlock.

Paul L. Sadler, Rex Houston, Henderson, for appellees.

Before CORNELIUS, C.J., and BLEIL and GRANT, JJ.

OPINION

GRANT, Justice.

This is an appeal from a judgment entered against six defendants in a products liability case in which five plaintiffs suffered asbestos-related injuries resulting from their exposure to various products manufactured by the defendants. The basis of the lawsuit was strict liability for failure to warn of the risks of exposure to asbestos. Of the five personal injury claims, two were lung cancer death claims (George Williams and Donald Freeman). The other three claims included a confirmed asbestosis case (Charles Strong), a disputed asbestosis case (Thomas Sledge), and a case in which the plaintiff had asbestos-related pleural disease (Reuben Pool). The jury awarded compensatory damages of $5,087,000, and punitive damages totaling $5,000,000.

The two above-styled and numbered cases were consolidated for trial under cause numbers 86-363 and 88-08-293. The cases were also consolidated for appeal to this Court.

The five appellants in this case filed separate briefs setting out thirty-eight different points of error. Appellant Fibreboard has eight points of error in its brief and adopts twenty-three points of error from appellant Owens-Illinois, twenty-two points of error from appellant Celotex, and two points of error from appellant Garlock. The adoption of points in multi-party appeals should be encouraged to conserve words, paper, and the eyesight of

the members of the judiciary. Owens-Illinois sets out twenty-three points of error in its brief. Appellant Flintkote's brief has eleven points of error; Garlock's brief contains ten points of error; and Celotex sets out twenty-two points of error in its brief. We have combined the points into the following thirty-five issues for the purposes of discussion:

(1) whether the trial court properly admitted into evidence the "Sumner Simpson papers";

(2) whether the trial court properly refused to give appellants' requested limiting instruction in regard to the Sumner Simpson papers;

(3) whether the trial court abused its discretion in admitting autopsy photographs of Donald Freeman;

(4) whether the trial court submitted a proper damage question to the jury in regard to appellees Strong, Sledge, and Pool;

(5) whether the trial court properly refused the appellants' tendered instruction to limit compensatory damages for conditions resulting from exposure to asbestos-containing products;

(6) whether the trial court properly submitted Question No. 17 which included "loss of enjoyment of life" as an element of damages;

(7) whether the cancer instruction concerning appellees Strong, Sledge, and Pool caused the jury to compensate them for future cancer not caused by asbestos exposure;

(8) whether the trial court properly admitted a color poster prepared by the Oil, Chemical and Atomic Workers International Union;

(9) whether the trial court properly admitted deposition testimony of witnesses Virgil M. Evans and James

Henry Read in which appellants' cross-examination was limited to five written questions;

(10) whether the trial court properly excluded evidence of military specifications requiring the use of asbestos in insulation products;

(11) whether the trial court properly excluded a portion of the deposition testimony of Dr. Corwin Hinshaw, the appellants' state-of-the-art expert on asbestos;

(12) whether the trial court properly denied appellants' motion for directed verdict on limitations against appellee Strong;

(13) whether the trial court properly entered judgment based on the jury findings in favor of appellee Strong that he did not know nor should he have known more than two years before filing suit that he had developed an asbestos-related disease;

(14) whether the trial court properly entered judgment based upon the jury's finding in favor of appellee Pool for future medical expenses;

(15) whether sufficient evidence existed for the trial court to render judgment in favor of appellee Pool based upon the jury's finding of $100,000 in damages;

(16) whether the trial court abused its discretion in permitting Donna Freeman and Ollie Freeman to file answers to Garlock's request for admissions;

(17) whether there was any evidence or sufficient evidence to support the jury award to Ollie Freeman for $30,000 in damages;

(18) whether any evidence existed to support the trial court's judgment in favor of the Williams children based upon the jury's finding of $25,000 in damages for pecuniary loss and $25,000 in damages for termination of the parent-child relationship;

(19) whether sufficient evidence was presented for the trial court to render judgment in favor of the Williams children;

(20) whether sufficient evidence existed for the trial court to render judgment against appellant Owens-Illinois based upon the jury's finding that the appellant caused twenty-five percent of the appellees' asbestos-related injuries;

(21) whether the awarding of punitive damages violates the due process clause of the United States Constitution or the Texas Constitution and the excessive fines provision of the Texas Constitution and the common law of Texas;

(22) whether any or sufficient evidence existed to show that appellant Garlock's products were defective, unreasonably dangerous and contributed to appellees' injuries;

(23) whether sufficient evidence existed to support the jury verdict in respect to appellant Flintkote;

(24) whether sufficient evidence was present to support jury findings of punitive damages against appellants, Garlock, Flintkote and Fibreboard;

(25) whether the trial court acted within its discretion under TEX.R.CIV.P. 265 when it refused to allow appellant Flintkote to make its opening statement to the jury at the beginning of its case-in-chief;

(26) whether the trial court properly submitted to the jury questions concerning liability and comparative causation;

(27) whether the jury's answer to Question No. 8 (finding the companies that supplied asbestos-containing products which were the producing cause of appellees' injuries) was against the great weight and preponderance of the evidence;

(28) whether the jury's answer to Question No. 16 apportioning fault was against the great weight and preponderance of the evidence;

(29) whether the trial court properly admitted into evidence the depositions of William Simpson, Kenneth Wallace Smith, Barry Castleman, Thomas Mancuso, Arthur Mueller and Richard Gaze;

(30) whether the trial court abused its discretion in failing to give a limiting instruction on the above depositions regarding appellant Garlock;

(31) whether the trial court properly submitted jury questions which allowed the jury to award punitive damages and whether the questions commented on the weight of the evidence;

(32) whether the trial court properly submitted Question No. 20 in the verdicts of Pool, Sledge, and Strong which asked for the assessment of punitive damages "for the injuries of" each plaintiff and whether this resulted in a double recovery for compensatory damages;

(33) whether the trial court properly excluded a letter offered by Celotex to prove that it had done everything possible to reduce the hazards of asbestos exposure;

(34) whether the trial court properly excluded evidence concerning exposure to the products of Johns-Manville and other companies which were under the direction of bankruptcy courts;

(35) whether the trial court created a cumulative effect of errors in the trial to deprive appellants of their rights to a fair trial and due process of law.

NATURE OF THE CASE

Between the 1950's and the present, appellees worked as insulators or maintenance mechanics performing insulation repair work at Texas Eastman in Longview, Texas, and at other companies. During their employment at Texas Eastman, appellees handled numerous products that contained asbestos. The appellants supplied asbestos products to Texas Eastman: Fibreboard, Owens-Illinois, and Celotex supplied asbestos insulation; Flintkote supplied liquid asbestos products used to cover the insulation; and Garlock supplied gaskets and valve packing. The evidence showed that the appellees used products manufactured by all of the appellants, except that there was no evidence that Williams used any of Garlock's products.

The evidence further showed that the dangers associated with exposure to asbestos were well known by the late 1940's. The appellees, however, were not warned of these dangers. Although some of the appellants stated that a caution label was placed on their boxes in the mid-1960's to 1970's, the evidence showed that neither the purchasing agent at Texas Eastman nor any of the appellees saw the warnings.

THE SUMNER SIMPSON PAPERS

The appellants contend that the trial court erred in admitting into evidence what is generally referred to as the Sumner Simpson papers and that the trial court further erred in refusing to give their requested limiting instructions in regard to the papers. The Sumner Simpson papers include about 6,000 documents, but only seven letters were offered into evidence by the appellees. These letters are a collection of correspondence from the 1930's and 1940's among the following three people: Sumner Simpson, former President and Chairman of the Board of Raybestos-Manhattan; Vandiver Brown, an in-house attorney for Johns-Manville; and A.S. Rossiter, editor of

Asbestos Magazine. The letters show knowledge about the hazards of asbestos during the 1930's and 1940's.

At trial, appellants objected to the admission of the Sumner Simpson papers on the basis that they were hearsay, that the documents were not properly authenticated and therefore not admissible under TEX.R.CIV.EVID. 901, that they were irrelevant under TEX.R.CIV.EVID. 401 and 402, that their prejudicial effect outweighed their limited probative value, that their effect amounted to cumulative prejudice and caused confusion, that the issue for which the proof was offered was uncontested (i.e., that asbestos caused asbestosis in the 1930's), that they were not probative as to the liability of manufacturers who manufactured a totally different kind of product, and that it was evidence that concerned bankrupt companies (Johns-Manville and Raybestos-Manhattan). The trial court sustained an objection to summaries of this material.

On appeal, appellants brought forward these complaints and also specifically contended that the material in the letters was irrelevant because Johns-Manville and Raybestos-Manhattan, which were involved in the correspondence, were not parties to this case. Appellants further contend that the letters were irrelevant because the parties to this case were not recipients of the letters, and because there was no showing that the appellants were aware of the letters.

In a failure-to-warn case, the plaintiffs are required to establish that the dangers were reasonably foreseeable or scientifically discoverable at the time of the exposure before a defendant can be found liable. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1088 (5th Cir.1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). All manufacturers are held to the knowledge and skill of an expert. *Borel*, 493 F.2d at 1089.

The appellants contend that the Texas Supreme Court in *Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex.1989),

rejected the holding in *Borel*. In the *Borel* case, it was uncontroverted that the plaintiff was injured from inhaling asbestos dust and that he was in fact exposed to the products of all of the defendants. In the *Gaulding* case, the court found that the evidence did not establish who manufactured the board that contained asbestos. The Texas Supreme Court did not reject the holding in *Borel* but distinguished it from *Gaulding*.

If the dangers of asbestos were known at the time of the exposure, then the same risks were scientifically discoverable by other asbestos corporations. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1317 (5th Cir.1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986). The fact that Raybestos-Manhattan and Johns-Manville are not parties to this case does not make these letters inadmissible to show that the dangers of asbestos were known during that earlier time period. *See King v. Armstrong World Industries*, 906 F.2d 1022, 1025 (5th Cir.1990). Furthermore, appellees were not required to show that appellants were aware of the letters or were recipients of the letters to show that the dangers of asbestos were known in the industry at that time.

In the case of *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir.1986), the appellate court was reviewing the case in which the trial court had excluded the offer of some of the Sumner Simpson papers. The court concluded that the trial judge did not err in excluding these documents because what the asbestos manufacturers knew and when they knew it was presented in great detail by experts, which made the evidence presented by the Sumner Simpson papers a repetition of the other evidence. In *Jackson*, 750 F.2d at 1318, the court, sitting *en banc*, held the Sumner Simpson papers admissible to show what asbestos manufacturers knew or should have known about the dangers of inhaling asbestos fibers.

Flintkote also contends that the letters cannot be relevant to it because the companies involved in the letter writing did not make liquid products containing asbestos. Flintkote's duty as a manufacturer was not limited to obtaining only the knowledge in some narrowly specialized field, but extended, at a minimum, to keeping abreast of scientific knowledge, discoveries and advances. *Borel*, 493 F.2d 1076. The Sumner Simpson letters pertained to the dangers of asbestos fibers generally when inhaled into the lungs and would be admissible against Flintkote in conjunction with other evidence that showed that the asbestos fibers from its product could be inhaled into the lungs.

Some of the Sumner Simpson papers have been admitted in several federal cases to show what asbestos manufacturers, other than Johns-Manville, knew or should have known about the dangers of inhaling asbestos fibers. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir.1985); *Jackson*, 750 F.2d 1314. In the case of *Jackson*, the court found that this evidence showed the likelihood of the foreseeability of the dangers of asbestos products. The appellate court said that the slight danger that the admission of such evidence would have caused sufficient unfair prejudice to warrant exclusion was properly ignored by the trial court. While the portion of letters dealing with the proposed cover-up should have been deleted, we do not find that the unfair prejudice outweighs the overall probative value of these papers.

The Simpson deposition properly authenticates these letters, and they are admissible as exceptions to the hearsay rule under the business records exception, TEX.R.CIV. EVID. 803(6), as well as the ancient document exception, TEX.R.CIV.EVID. 803(16).

Appellees contend that they had an agreement with appellants that they could introduce Simpson's deposition without being required to show his unavailability. We find no such agreement in the record. The hearsay ob-

jection at trial points only to the letters which were Exhibits 465-A, 465-B, 465-C, 465-D, 465-E, 465-F and 465-J. However, the only objections made at trial to Simpson's deposition [1] were that it was highly prejudicial and was not relevant to the issue of liability of the companies that did not make insulation. The deposition lays the predicate for the introduction of the letters and thus it was necessary for the introduction of evidence concerning the dangers of asbestos fibers, regardless of the source, when inhaled into the lungs. This is relevant to all parties in this cause of action. The points of error concerning the introduction of the Simpson deposition and Sumner Simpson papers are overruled.

Appellants also complain about the failure of the trial court to give a limiting instruction at the time the Sumner Simpson exhibits were offered into evidence and in the charge submitted to the jury. When the exhibits were introduced, appellants requested that the trial court give this limiting instruction to the jury: "This evidence is not to be considered for the purpose of determining the actual knowledge or state of mind of any Defendant." This requested instruction was overly broad because it would have prevented the jurors from inferring that any of the appellants had actual knowledge of the dangers of asbestos. This would negate the presumption that manufacturers are experts who have the same knowledge that other manufacturers in that industry have.

In the case of *King v. Armstrong World Industries*, 906 F.2d 1022, the trial court gave the following limiting instruction: "You are instructed that the deposition testimony of William S. Simpson . . . and Richard Gaze is offered for the limited purpose of showing, if it does,

---

[1] The record reflects that a hearsay objection was made to Exhibit 465. According to the record, Plaintiff's Exhibit 465 was a summary of a deposition, and the trial court sustained that objection.

what the industry knew or could have discovered by testing their products." This type of instruction would have allowed the jurors to infer that the defendants in that case had the same knowledge as the industry generally.

Appellants requested that two instructions concerning the use of the Sumner Simpson papers be placed in the jury charge:

> Proposed jury instruction (punitive damage).
>
> Certain evidence received during the course of trial relates to actual knowledge of particular companies, some of which are not parties to this lawsuit. Such evidence includes the Eagle Pincher documents; the Sumner Simpson papers; the Saranac Laboratory documents, and the deposition testimony of William Simpson, Kenneth Smith, Art Mueller, Dr. Frank Mancusso (sic) and Dr. Richard Gaze. You may not consider such evidence to establish willfulness or callous disregard on the part of any Defendant that did not have actual knowledge of such evidence.
>
> Proposed jury instruction (punitive damage).
>
> Certain evidence received during the course of trial relates to actual knowledge of particular companies, some of which are not parties to this lawsuit. Such evidence includes the Eagle Pitcher (sic) documents; the Sumner Simpson papers; the Saranac Laboratory documents; and the deposition testimony of William Simpson, Kenneth Smith, Art Mueller, Dr. Frank Mancusso (sic) and Dr. Richard Gaze. You may not consider such evidence to establish willfulness, intent, or callous or reckless or heedless disregard, or indifference on the part of any Defendant that did not have actual knowledge of such evidence.

These instructions would have been proper in regard to the Sumner Simpson papers; however, the trial court has considerably more discretion in submitting instruc-

tions and definitions than in submitting questions. *Harris v. Harris*, 765 S.W.2d 798 (Tex.App.—Houston [14th Dist.] 1989, writ denied); *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 207 (Tex.Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). The jury was capable of realizing that any manufacturer or seller that did not have actual knowledge of the dangers of asbestosis could not be said to have acted willfully or intentionally in failing to provide an appropriate warning. If the manufacturer or seller did not have knowledge of the dangers of asbestos, the jury then had to determine if they were reckless or indifferent because they could have obtained the information and chose not to do so.

The Sumner Simpson papers should not have been used to show that the appellants in this case were involved in a cover-up to prevent the public from having knowledge about the actual dangers of asbestosis. The showing that other companies mentioned in these papers were guilty of such acts in no way demonstrates that these appellants were involved in such conduct. The appellees attempt to justify the drawing of such an inference based upon language in one of the letters referring to the "industry, mostly working as a unit." However, this reference in the letter simply refers to the making of a systematic dust investigation and further states that these investigations are generally paid for by "industry, mostly working as a unit." It does not refer to an industry-wide cover-up of the dangers of asbestos.

Appellants point out that the appellees made unjustified implications when their attorney in his summation referred to the cover-up discussed in the Sumner Simpson letters and told the jury, "See how it affects you, because you are going to be asked about punitive and exemplary damages that I'm going to talk about in a little bit." This argument, however, was not objected to at trial, and it is only mentioned on appeal in conjunction with the argument about the inadmissibility of the Sumner Simpson papers. Thus, any error concerning the sum-

mation was not preserved and has not been brought forward on appeal. The jury was aware from the evidence that the persons discussing the cover-up of the dangers of asbestos were not parties or employees of parties to this suit. We find that the trial court's failure to give an instruction was not an abuse of discretion. These points of error are overruled.

ADMISSIBILITY OF PHOTOGRAPHS

Appellants next contend that the trial court abused its discretion in admitting the autopsy photographs of Donald Freeman. They contend that the admission of these photographs constituted reversible error because they were not relevant to any disputed fact. To be admissible, photographs must illustrate disputed fact issues and must portray facts relevant to an issue. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 889-90 (Tex.1975). Appellants objected to the admission of these photographs at every stage of the proceeding. Before trial, they filed a motion to exclude photographs and videotapes, which the trial court denied. At trial, they objected to the admission of the photographs on the ground that they did not show anything that was in dispute; and alternatively, that because of the gruesome nature of the pictures, any probative value was far outweighed by the danger of unfair prejudice. In addition, they moved twice for a mistrial, partially because the photographs were admitted into evidence.

The general rule is that pictures or photographs that are relevant to any issue in the case are admissible. *Texas Employers Ins. Ass'n v. Agan*, 252 S.W.2d 743 (Tex.Civ.App.—Eastland 1952, writ ref'd). When a photograph is a proper representation of an important fact issue, the admission or rejection of it is a matter which rests largely within the discretion of the trial judge, and that decision will not be disturbed on appeal unless an abuse of discretion is shown. *Richardson v.*

Missouri-K.T.R. Co. of Texas, 205 S.W.2d 819, 824 (Tex. Civ.App.—Fort Worth 1947, writ dism'd). Relevant evidence will not be excluded simply on the ground that it would create prejudice if permitted. *Sherwin-Williams Co. v. Perry Co.*, 424 S.W.2d 940 (Tex.Civ.App.—Austin 1968, writ ref'd n.r.e.). The fact that the photographs are gruesome does not render them inadmissible. *Texas Employers Ins. Ass'n v. Crow*, 218 S.W.2d 230 (Tex.Civ.App.—Eastland 1949), *aff'd*, 148 Tex. 113, 221 S.W.2d 235 (1949). Therefore, the question in the present case is whether the pictures were relevant and otherwise admissible.

At trial, appellants took the position that cigarette smoking, not asbestosis, caused Freeman to die of lung cancer. Thus, the appellees contend that the photographs were used to explain and demonstrate the involvement of asbestos in Freeman's death.

Dr. V.V. Gonzales, who performed the autopsy, testified that asbestos fibers could be seen only with a microscope and that there were no asbestos bodies in the lungs of Freeman. He testified that the asbestos fibers may disintegrate or fragment so that they cannot be found, but the effect of the toxic material liberated by those fibers can be found. He further testified that when the cancer is caused by smoking alone, there will not be scarring in the lungs, but when asbestos is involved there will be a grey-white scar tissue called hyaline plaques. He told the jury that in Freeman this tissue was discovered throughout the chest cavity, the covering of the heart and the diaphragm. According to Dr. Gonzales' testimony, Freeman's right lung was replaced by a tumor, especially in the upper half of the lung and that it extended to the middle part of the lung and encircled the major blood vessel in the back part of the lung. The tumor had also encased the esophagus, replaced almost one half of the right thoracic cavity, and invaded the adrenal glands below the diaphragm and a part of the kidney.

Dr. Gonzales pointed out to the jury the scarring or the hyaline material in the pictures taken during the autopsy:

> Exhibits 618-D, 618-E, 618-F: "... this is the so-called hyaline plaques .... The hyaline plaques that I mentioned is these grey-white spots and there's one that's nodular. This has covered the cavity, the pleural cavity, and also the diaphragm and also the covering of the heart."
>
> Exhibit 618-G: "This is another of the right side of the lung, the grey-white plaques here, scarring, and if you replace the chest cavity, which is again it occupies a certain volume of the space that will result into the decrease in the pulmonary function of the lungs."
>
> Exhibit 618-I: "I is another part of the hyaline plaques, nodules throughout that line part of the ribs and scar."
>
> Exhibit 618-J: "J is another exposure that shows the hyaline plaques at a closer view .... These are the scars of the pleura covering the chest cavity."
>
> Exhibit 618-K: "K is another area that showed the scarring, the hyaline material, the scar tissue.... This is associated with asbestos."
>
> Exhibit 618-L: "L is part of the lung tissue that I show the grey-white here or the plaques."
>
> Exhibit 618-O: "This is the grey-white hyaline plaques again that shows the covering of the heart is partly replaced by this grey-white plaque."
>
> Exhibit 618-P: "P is the cross-section of the right lung which shows just like a sponge in which the normal lung tissue is gone, it's replaced by diffuse replacement of the lung tissue by scar tissue."
>
> Exhibit 618-U: "... You can see the large spaces here which is called the bullae or the emphysematous bullae resulting from the scarring."

Exhibit 618-V: "V is another hyaline plaque. You can see this large one here."

Exhibit 618-W: "W is the entire lung after I removed the heart, the lung, and demonstrate the windpipe and cross-section of the tumor that has extended into above the backbone . . . . This is a close-up view of the plaque. There's a plaque here (indicating), there's a plaque here (indicating), this plaque, but again there is a nodule here that more or less formation of nodule. In addition to the plaque here in this nodule, there is some cancer in there. I make a cut, but I removed that and cut to demonstrate that nodule."

Exhibit 618-Z: "Z is a plaque that I mentioned that has replaced the diaphragm. This is at the end of the foreceps you can see the plaque, here."

Exhibit 618-BB: "This is another one of the thoracic surface or the surface of the diaphragm which indicates that there's a large plaque too."

Exhibits 618-DD, 618-EE: "This is the appearance of the adrenal glands. There are two glands on top of the kidney. The next side is here which is rather big, and when I cut it, you can see the white area, nodule, which is not normal in an adrenal gland, and these are—they spread resulting from the lung cancer."

Exhibit 618-HH: "This tumor has spread not only to the adrenal glands but this is one-half of the kidney, and you can see the nodule in that."

Exhibits 618-JJ, 618-KK, 618-LL: "Q Do any of these . . . show any of the scarring?

A Yes, sir.

Exhibit 618-LL: "This is a cross-section of the right lung. This white area here is the tumor . . . . [t]his part of the lung has been replaced by scar tissue."

The testimony shows that all of the foregoing exhibits refer specifically to the scarring or hyaline plaques, which in turn goes directly to an issue in the case. Dr. Gonzales testified that other exhibits, including 618-M, 618-N, 618-R, and 618-T, were duplications of exhibits showing the scar tissue, sometimes showing an enlargement of an area. Four of the pictures to which Dr. Gonzales referred do not demonstrate the scarring or hyaline plaques. Exhibits 618-A, 618-B, and 618-C are pictures of Freeman's body which, according to Dr. Gonzales, showed that the fat on his body was completely gone at the time of his death as a result of having cancer. Exhibit 618-H shows a part of the inside of the lung, which was black. This exhibit would not appear to harm the appellants in their contention that Freeman's death was caused by smoking.

Appellants objected to the 618 series of pictures outside the presence of the jury on the basis that they were not relevant to any disputed fact that they were prejudicial because of their gruesomeness. The counsel for the appellees stated at the hearing that he was not going to show all the photographs to the jury, "probably six or eight of them or ten at the outside." The court allowed a running objection on relevance and prejudice, but informed the attorneys for the appellants that he would permit them to reurge any objection on their (the photographs) being cumulative if there were any duplications at the time they were offered into evidence. Appellants' counsel apparently put all of the 618 series photographs into evidence, but no objection was made that the exhibits were cumulative or duplicative. Thus, any complaint on that basis was waived.

Overall these exhibits and the accompanying testimony are relevant to the issue of the cause of Freeman's death. The appellants argue that these photographs should not have been admitted because they did not dispute the presence of hyaline plaques and pleural thicken-

ing and because Dr. Gonzales gave testimony confirming the existence of hyaline plaques and pleural thickening, which was also corroborated by his autopsy report. The admissibility of evidence does not hinge on whether the opposing party is able to rebut the specific evidence, but on whether the evidence is relevant to a disputed issue in the case. Outside the presence of the jury, the appellants told the court that they did not dispute the fact that an autopsy was done, that hyaline plaques were present, and that pleural thickening was present. The appellants have not pointed out any place in the record that such an admission or stipulation was made in the presence of the jury. The appellants strongly disputed the element issue of causation and therefore the photographs were admissible to assist the expert in explaining and demonstrating why he believed that asbestos was the cause of Freeman's death. These points of error are overruled.

JURY CHARGE

Appellants next contend that the trial court should have limited the damages questions of appellees Strong, Sledge, and Pool to asbestos-related injuries and that the trial court should have allowed appellants' tendered instruction to limit compensatory damages for conditions resulting from exposure to asbestos-containing products. When a plaintiff suffers a pre-existing injury that is closely connected to the injury caused by the defendant, the trial court should affirmatively charge the jury that the plaintiff can recover only for the extent of injuries caused or aggravated by the defendant's negligence. *Dallas Ry. & Terminal Co. v. Ector*, 131 Tex. 505, 116 S.W.2d 683 (Tex.Comm'n App.1938, opinion adopted). To determine whether an alleged error exists or is reversible, the Court should consider the pleadings, the evidence, and the charge in their entirety. *Island Recreational Development Corp. v. Republic of Texas Savings Ass'n*, 710 S.W.2d 551, 555 (Tex.1986).

In the present case, Question No. 17 in each of the series of questions on Strong, Sledge, and Pool asked the jury to determine the sum of money that would fairly and reasonably compensate each appellee "for his injuries, if any, resulting from the occurrence in question." Question No. 18 in each series required the jury to determine the amount of money to compensate each of the spouses "for the injuries, if any, to her husband resulting from the occurrence in question." The appellants objected to the submission of these issues on the grounds that there was no evidence or insufficient evidence to determine the meaning of "occurrence in question" and requested that the instruction be limited to asbestos-related injuries.

Appellants cite *Littleton v. Woods*, 538 S.W.2d 800 (Tex.Civ.App.—Texarkana 1976), *aff'd*, 554 S.W.2d 662 (Tex.1977), in support of their contention. In *Littleton*, this Court held that the issue concerning damages for mental anguish suffered "as a result of the occurrence in question" was defective because it did not limit the jury to awarding damages for mental anguish caused by acts that the defendant produced or proximately caused. *Littleton*, 538 S.W.2d at 801-02. However, the *Littleton* case involved more than one theory of recovery.

The only theory of recovery in the present case was for damages resulting from appellants' failure to warn of dangers associated with exposure to asbestos. The charge in its entirety reflects this theory by requiring a finding of asbestos-related injury resulting from the failure to warn. Question No. 1 of the jury charge for each appellee asked, "Do you find that the [appellee] has sustained an asbestos-related injury?" The charge continues in Question No. 2 inquiring whether the appellee was exposed to asbestos-containing products to such an extent that the exposure was a producing cause of the injury. Question No. 5 inquired whether the appellants failed to adequately and timely warn of the dangers of

injury. Questions No. 6 and 7 inquired if the failure to warn rendered the asbestos-containing products unreasonably dangerous as marketed and if such failure was a producing cause of the injuries and damages in question. Finally, Questions No. 17 and 18 asked what sum of money would fairly and reasonably compensate the appellee and his spouse for his injuries, if any, resulting from the occurrence in question.

Because the liability issues were submitted with the term *injury* and focused the jury's attention on asbestos-related injuries resulting from the failure to warn of the dangers of asbestos, the appellants' requested instruction to limit Questions No. 17 and 18 to asbestos-related injuries was not necessary. *See* 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 80.07 comment (1990). The wording of Questions No. 17 and 18 contains the appropriate damages issue generally used in personal injury cases. *See* 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 80.02B, 80.03B (1990). The language used in Questions Nos. 17 and 18 properly limited appellees' damages to asbestos-related injuries where the only recovery sought was for damages resulting from appellants' failure to warn of the dangers of asbestos. These points of error are overruled.

Appellants duly objected to the inclusion of "loss of capacity for enjoyment of life" in the charge and on appeal complain of the trial court's inclusion of this language. The amount awarded for "loss of capacity for enjoyment of life" was lumped together with pain and mental anguish.

The states divide on the issue of allowing loss of enjoyment of life in tort cases into those states that hold that loss of enjoyment of life is a factor in determining damages in general and those states that take the view that loss of enjoyment of life is a proper, separate element of damages. *See* Annot., 34 A.L.R.4th 293 (1984). Texas courts have taken the position that loss of enjoyment of

life may not be claimed as a separate element of damages, but may be treated as a factor in determining damages in general or for pain and suffering. *Missouri Pacific R. Co. v. Lane*, 720 S.W.2d 830 (Tex.App.—Texarkana 1986, no writ).

In the charge, the jury was asked to assess damages for "pain, mental anguish, *and* loss of capacity for enjoyment of life" (emphasis added). Appellants complain that the use of the conjunction *and* instructed the jury to award damages for the loss of enjoyment of life in addition to damages for pain and mental anguish. Appellees argue that this combined submission constitutes a single element.

In the case of *Dugas v. Kansas City Southern Railway Line*, 473 F.2d 821 (5th Cir.1973), the court was faced with a similar charge, and the court ruled that using the word *and* made it appear to the jury that "loss of enjoyment of life" and "loss of vitality" were separate and independent, rather than includable items of damages. And at the very least, they were couched in terms that would have confused the jury as to the correct standards. The court reversed the case, saying that the defendant was entitled to have a jury measure those damages according to a clear, legally correct, plainly enunciated standard. A significant difference in that case was the inclusion of the term "loss of vitality," and an instruction to the jury warning them not to duplicate the "plaintiff's physical impairment and loss of vitality." The court in the *Dugas* case did not instruct the jury concerning the possible duplication of loss of enjoyment of life with other elements. The jury was therefore left to infer that since it was instructed concerning one and not the other, that it was free to allow double recovery in regard to "loss of enjoyment of life."

In an early Texas case, the court held that evidence showing a loss of capacity for "enjoyment of pleasures of

life" was too vague to furnish information on damages. *Locke v. International and GNR Co.*, 25 Tex.Civ.App. 145, 60 S.W. 314 (1901, no writ). Later Texas cases recognized this loss to be a factor in determining damages. *Lane*, 720 S.W.2d 830. The evidence allowed to show pain and suffering generally includes a showing of a diminishment of enjoyment of life and the loss of being able to function as a whole person. This element is not to be considered as a separate item because of the possibility of double compensation. Although the better wording would have specified its inclusion as a part of pain and mental anguish, the lumping of this factor together with pain and mental anguish was not likely to cause the jury to reach a double compensation for this element. These points of error are overruled.

Appellants next complain that the trial court erred in its instruction in regard to possible future cancer in the damage question for Charles Strong.[2] Appellants argue that the cancer instruction allowed the jury to compensate for future cancer without regard to its cause and that the instruction is a comment on the weight of the evidence. The instruction must be read in context. The initial Question No. 17 to which it relates is as follows:

> From a preponderance of the evidence what sum of money, if any, if paid now in cash, do you find will fairly and reasonably compensate the plaintiff

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[2] The trial court gave the following instruction concerning the probability of cancer in the future: "In answering this question as to each future element of damage I instruct you that you may consider and compensate for in your answer cancer or mesothelioma which you find from a preponderance of the evidence he will suffer in the future in reasonable probability. If you do not find that he will in reasonable probability suffer a cancer or mesothelioma, you may consider and compensate the plaintiff for any mental anguish he has suffered or will suffer in the future from his reasonable fear, if any, of cancer and mesothelioma he might suffer from his asbestos exposure, distinct from any fear of cancer which all persons might have."

> Charles Strong, for his injuries, if any, *resulting from the occurrence* in question.

(Emphasis added.) This language clearly ties everything under it to the occurrence in question. The last portion of the cancer instruction itself limits the mental anguish to that which he has suffered or will suffer from his reasonable fear of "cancer or mesothelioma he might suffer from his asbestos exposure." The only cancer evidence related to Strong concerned his exposure to asbestos and the only recovery sought and argued before the jury from the voir dire to the final summation was for asbestos-related injuries. When viewed in the context of the trial and the charge, the instruction is properly limited and does not constitute a comment on the weight of the evidence. These points of error are overruled.

ADMISSIBILITY OF POSTER

The next contention is whether the trial court properly admitted a color poster prepared by the Oil, Chemical and Atomic Workers International Union. Appellants objected to the poster on the ground that it was inadmissible hearsay. The large color poster declares the hazards of asbestos and states that it is causing an "epidemic on the same scale as the bubonic plague which killed millions during the Middle Ages." It further states that even a few days of exposure to asbestos can be dangerous.

The face of the poster shows that it was written by Dr. Molly Coye. Dr. Joseph Wagner testified that Coye prepared the poster as a consultant to the Oil, Chemical and Atomic Workers International Union, which was then under contract with the United States Department of Labor. Coye did not testify at the trial. Appellees suggest on appeal that the exhibit was admissible under TEX.R.CIV.EVID. 803(8). Rule 803(8) allows admission of:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth

> (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or (C) factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

Appellees contend that the poster is admissible under this rule because the poster is on file with Occupational Safety and Health Administration (OSHA) and has been adopted by the United States Department of Labor. Rule 803(8), however, is applicable only when the exhibit is prepared by public officials or employees under their supervision in the performance of their official duties. *Railroad Commission of Texas v. Rio Grande Valley Gas Co.*, 683 S.W.2d 783, 788 (Tex.App.—Austin 1984, no writ). Documents prepared by private individuals and filed with a governmental agency are not official documents as contemplated by Rule 803(8). *Id.* Even if Dr. Coye was under contract with the United States Department of Labor, she was not shown to be a public official or under the supervision of a public official. Furthermore, the poster does not meet any of the requirements under Rule 803(8) because it does not purport to set forth activities of OSHA or matters observed pursuant to a duty imposed by law or factual findings resulting from an investigation authorized by law. Thus, the poster does not fall within this exception to the hearsay rule.

Appellees further contend that appellants did not properly object at trial to admission of the poster because they did not object to its lack of authentication. However, the party seeking to have hearsay declarations admitted as an exception to the general rule must clearly show that they are within the exception. *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298 (Tex.1962). Because the poster was inadmissible hearsay, appellees had the burden of establishing a reason for introducing the ex-

hibit. Appellees did not suggest any reason for the introduction of the exhibit except for the truth of the matter stated on the exhibit, and thus, appellants' objection was sufficient to preserve error. We conclude that the trial court erred in admitting the poster into evidence in violation of TEX.R.CIV.EVID. 802.

We must examine the entire record to determine if the admission of this exhibit constituted reversible error. In order for an error to be reversible, we must determine that it was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. TEX.R.APP.P. 81(b)(1). The main thrust of informaton contained in the poster is that exposure to asbestos is dangerous. Because this information is basically repetitive of evidence offered by expert witnesses, its admission was not reasonably calculated to cause and probably did not cause the rendition of an improper judgment. Thus, this admission did not constitute reversible error.

DEPOSITION LIMITATIONS

Appellees next contend that the trial court abused its discretion in admitting written deposition testimony of witnesses Virgil M. Evans and James Henry Read. During pretrial discovery, based upon a motion by the appellees, the trial court limited appellants' examination of Evans and Read to fifty cross-questions for the designated liaison counsel and five cross-questions each for the remaining defendants. At the time the discovery dispute arose, the case involved eighteen separate defendants with common interests and defenses. The court appointed the liaison counsel to speak and act on behalf of the defendants. Appellees contended that because of the poor health and age of these witnesses, the court should limit the cross-examination by the appellants. No limit was placed on the appellees. These two witnesses testified concerning appellee Williams' exposure to the asbestos-

containing products manufactured by the appellants. Appellants duly objected to the procedure and filed motions to quash the written depositions. They also objected to the answers of Evans and Read upon receiving the deposition transcripts and to the admission of the depositions into evidence at the trial.

Appellees contended in oral argument that the trial judge had instructed counsel that if they had additional problems they could ask for more questions to be submitted to these witnesses. However, we have found nothing in the record to support this contention. Appellees further contend that because appellants did not make the omitted evidence a part of the record, there is no showing of reversible error. This Court will not require the appellants to have made a bill of exceptions containing evidence that the trial court has prohibited them from acquiring, but appellants could have submitted additional cross-questions to the trial court to demonstrate that they were deprived of getting needed answers.

Appellees correctly point out that mandamus is available for wrongful denial of discovery by the trial court, and the appellants did not seek that remedy. However, the failure to file a writ of mandamus does not prejudice or waive appellants' right to complain on appeal. *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex.1990).

The failure to allow a party meaningful cross-examination of witnesses is harmful, reversible error. *Fillion v. Osborne*, 585 S.W.2d 842, 845 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ). The appellants cite *Velasco v. Haberman*, 700 S.W.2d 729 (Tex.App.—San Antonio 1985, no writ), in which the court found that the trial judge's limitation of inquiry regarding adultery and marital fault to no more than five questions was an abuse of discretion. The court found that such a limitation on questions about a relevant issue was an arbitrary and unreasonable restriction on discovery because there was no basis for such a limitation. A trial court has

broad discretion as to whether deposition shall be oral or written. *Munden v. Chambless*, 315 S.W.2d 355 (Tex. Civ.App.—Dallas 1958, writ ref'd n.r.e.). Rule 166b(5) of the Texas Rules of Civil Procedure permits the trial court to enter protective orders in the interest of justice as necessary to protect the movant from undue burden.

The liaison counsel submitted only thirty-nine cross-questions, and the only appellant to submit cross-questions to Evans was Flintkote. None of the appellants offered any cross-questions to Read. Until the appellants exhaust the number of questions allotted to them individually and through a liaison counsel, they cannot be heard to complain that they were denied the right to ask additional questions. If the liaison counsel had refused to cooperate with any other counsel for the appellants, then the additional cross-questions available through him would not have counted against that appellant. The record in no way indicates that there was any complaint about any lack of cooperation by the liaison counsel. Twelve allotted questions were not used by the liaison counsel, and except for Flintkote's five questions to Evans, the other appellants did not use their five allotted questions. Therefore, no harm could have resulted from the trial court's failure to allow more questions. There could be no error until appellants exhausted their allotted questions and were refused additional questions. These points of error are overruled.

ADMISSIBILITY OF BUILDING CODES AND GOVERNMENT SPECIFICATIONS

Appellants contend that the trial court erred in excluding exhibits of governmental military specifications requiring the use of asbestos in insulation products and in excluding a portion of Dr. Corwin Hinshaw's testimony that many building codes demanded the use of asbestos.[3]

[3] The excluded evidence included the following statement: "Of course it is used for prevention of fire. I'm sure that many, many

There was no showing that the appellees' jobs involving asbestos exposure were related in any way to governmental or military contracts or that building codes that required the use of asbestos were applicable.

Appellants contend that this evidence should have been admitted on the exemplary damage issue to show that they were acting in good faith in the manufacturing and supplying of asbestos. The balancing of the utility of the products against their danger does not remove the manufacturer and seller's duty to advise and enlighten the consumer in the safe use of the product. Even when a balancing of the product's utility against its known or foreseeable danger leads to a conclusion that marketing of the product is justified, the seller still has a responsibility to inform the user or consumer of the risk of harm, and failure to give adequate warnings in these circumstances renders the product unreasonably dangerous. *Borel*, 493 F.2d 1076.

The present case focuses on a lack of adequate warnings. The exemplary damages awarded in this case were not based upon the companies' conduct in manufacuring and distributing asbestos, but, according to the wording of the jury questions, was based upon the failure to warn those handling the product of its potential dangers. The evidence concerning government specifications and building codes could have been admitted on the state-of-the-art issues. Its exclusion, however, was not an abuse of discretion by the trial judge because there was considerable evidence admitted about the wide-spread use of asbestos, including testimony that asbestos had over 3,000 industrial uses. These points of error are overruled.

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building codes have demanded the use of asbestos in theaters, for example; theater curtains of asbestos undoubtedly contained or prevented catastrophic fires in theaters. Its' (sic) use in schools as a prevention of fires had undoubtedly saved lives."

STATUTE OF LIMITATIONS

Next, appellants contend that the trial court erred in denying their motion for directed verdict based upon their statute of limitations defense against Strong. In reviewing the denial of a motion for a directed verdict for the defendant, the question is whether the evidence adduced at the time the plaintiff rests his case, viewed in the light most favorable to the plaintiff, raises an issue for the jury. *Vance v. My Apartment Steak House*, 677 S.W.2d 480, 483 (Tex.1984).

In tort liability cases, the statute of limitations period commences when the injured party discovers, or in the exercise of ordinary care, should have discovered, the injury. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). Because the injury occurred more than two years before suit was filed, Strong and Pool were required to prove facts sufficient to suspend the operation of the statute of limitations. *Willis*, 760 S.W.2d at 644; *Weaver v. Witt*, 561 S.W.2d 792 (Tex.1977).

According to the evidence, Strong was examined by the Texas Eastman Company medical department on March 12, 1979. This resulted in a chest x-ray report which stated "[f]indings in the chest could be compatible with changes secondary to asbestosis." On February 21, 1983, Texas Eastman gave Strong another physical examination. In connection with this examination, Strong answered a questionnaire in which he checked "yes" in the box indicating that he had a medical condition or problem that he thought was work-related. Three items are listed, the second of which was "pulmonary fibrosis acquired from working with asbestos." When asked whether he read the questionnaire before signing it, Strong answered,

> Well, we never did read them. He just threw them on our desks back then and we just signed them and walked out because we wanted to get out of there

because we knew we wasn't going to find out anything anyhow.

Appellants assert that when Strong signed the questionnaire he was charged with knowledge of the report's contents. Appellants contend that Strong was charged with notice as a matter of law, citing *Sutton v. Grogan Supply Co.*, 477 S.W.2d 930 (Tex.Civ.App.—Texarkana 1972, no writ), and *Ussery v. Hollebeke*, 391 S.W.2d 497, 503 (Tex.Civ.App.—El Paso 1965, writ ref'd n.r.e.). In the *Sutton* case, this Court held that when a deed is signed by a party and recorded that party is charged as a matter of law with constructive notice of its content. In the *Ussery* case, the court held that the grantor as a matter of law is charged with the knowledge of the contents of his deed. These cases stand for the general rule that a person signing a contract or a deed cannot later say that he did not read it when he signed it or did not know what it contained. The present case does not involve a deed or contract and such constructive knowledge will not be charged against the signer as a matter of law.

Strong testified that he was never told by anyone at Texas Eastman that he had asbestosis. No evidence was offered showing that anyone at Texas Eastman told this to Strong. Also, there was no showing that this notation was on the record at the time Strong signed it. Strong's testimony raised the fact issue about whether he knew or should have known that he had asbestosis. We find that the evidence at the time the plaintiff rested, when viewed in a light most favorable to the plaintiff, raised an issue for the jury. These points of error are overruled.

Appellant Celotex also challeges the jury's finding on this issue as being against the great weight and preponderance of the evidence. In reviewing a great weight argument, because the burden of proof was on the appellants, they must show that the finding of the jury was so contrary to the great weight and preponderance

of the evidence as to be manifestly unjust. Calvert, "*No Evidence*" *and* "*Insufficient Evidence*" *Points of Error*, 38 TEX.L.REV. 361 (1960). In reviewing these points, we will examine all of the evidence in the record that is relevant to the fact being challenged. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex.1989); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). As previously discussed, we have examined the evidence by these standards and find that the finding of the jury was not against the great weight and preponderance of the evidence or manifestly unjust.

Garlock contends that the trial court erred in not granting both its motion for directed verdict and its motion for judgment notwithstanding the verdict on the basis of its statute of limitations defense against Pool. We have previously set forth the standard for reviewing a denial of a motion for directed verdict. For appellate purposes, a complaint that the trial court erred in refusing to grant a judgment notwithstanding the verdict, raises only a no evidence point for appellate review. *Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 241-42 (Tex.1988). Garlock cites the following testimony by Pool to show that Pool was aware of his problem two and a half years before the institution of suit:

> Q And in fact, I think you said earlier in your testimony you had had breathing problems probably even back into the 70's before then.
>
> A Yes, sir.
>
> . . . .
>
> Q And by 1984 you were still having those problems and you thought it might be due to asbestos exposure, didn't you?
>
> A I was having the problem and I was wanting to find out what it was due to.
>
> Q Okay. And that's why you went to see Mr. Houston?
>
> A Well, yes, sir, that's why I went to see Mr. Houston.

Q All right. And then Mr. Houston is the one that sent you down to see Dr. Comstock. We've already talked about that, haven't we?

A Yes, sir.

Q And, of course, you were seen at Dr. Comstock's office in May of 1984; is that correct?

A I don't remember—I don't remember the date, but I agree with it.

. . . .

Q [Reading from Dr. Mann's records] "No hospitalization or been to doctor in over a year. Worked at Texas Eastman for 27 years. Is having a difficult time breathing, states that he has not been able to work much lately due to chest problems. Has been bothered for a long time. Dr. Morris had him in hospital a couple of years ago, told him it was fat. He is thinking he has asbestosis."

A Dr. Morris said?

Q No, that's what Dr. Mann says you were thinking. March 13, 1984.

A I can't go along with that. How could I have diagnosed myself? That's not true. That's untrue.

When asked if he had talked to people at Texas Eastman about his conversation with Dr. Mann, Pool answered that he believed that he did. The record then reflects the following questions and answers:

Q [Reading from Pool's employment record] "States Dr. Mann told him that the reports from Houston said his problem was asbestos related." Is that correct?

A I worked in asbestos. I don't know about the other part now.

. . . .

Q All right. And you told the people at Texas Eastman on 8-16-84 that Dr. Mann told you that the reports from Houston said your problem was asbestos related?

A Well, I can't say for sure about that.

Q You don't dispute that though; that's in your records.

A I dispute that. I don't know.

Limitations begin to run from the date when the plaintiff has knowledge of facts, or from the date, in exercise of ordinary care and diligence, he should have discovered the facts. *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1972). Pool steadfastly denied throughout his testimony that he had ever received any report or oral statement from Texas Eastman or from any doctor during the time period prior to two years before filing suit that he had asbestosis. When viewed in the light most favorable to the plaintiff, there was evidence creating a fact issue as to whether Pool knew or should have known about his injury. The trial judge properly denied the motions for an instructed verdict and for a judgment notwithstanding the verdict.

POOL'S FUTURE MEDICAL EXPENSES

Next, appellants contend that there was no evidence or insufficient evidence to support the jury's award of $100,000 to Pool for future medical expenses.[4] In reviewing no evidence points, the Court considers only the evidence tending to support the finding, viewing it in the light most favorable to the finding, giving effect to all reasonable inferences therefrom, and disregarding all contrary and conflicting evidence. *Glover v. Texas General Indemnity Co.*, 619 S.W.2d 400 (Tex.1981). Insufficient evidence points require that we consider and weigh all the evidence. *In re King's Estate*, 244 S.W.2d 660.

Recovery for future medical expenses requires a showing that there is a reasonable probability that such medical expenses will be incurred in the future. *Fisher v.*

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[4] Celotex has only an insufficiency point of error. Owens-Illinois has both a no evidence and an insufficient evidence point. Other appellants adopted these points of error.

Coastal Transport Co., 149 Tex. 224, 230 S.W.2d 522 (1950). The jury question was worded as follows: "Reasonable and necessary Future Medical Expenses which you find that *in Reasonable Probability* he [Pool] will sustain in the Future" (emphasis added).

Likelihood and *probability* are synonymous. *Robinson v. Argonaut Insurance Co.*, 534 S.W.2d 953, 958 (Tex. Civ.App.—Fort Worth 1976, writ ref'd n.r.e.). The word *probable* conveys a meaning of *more likely than not. See Parker v. Employers Mutual Liability Insurance Co. of Wis.*, 440 S.W.2d 43, 47 (Tex.1969). Quantifying probability, it means a more than fifty percent chance. *See Fidelity & Guaranty Ins. Underwriters v. Gary Douglas Electric*, 48 Ohio App.2d 319, 357 N.E.2d 388, 392 (1974).

Dr. J.D. Britton was the only witness who testified about future medical expenses. He testified that Pool had minimal evidence of an asbestos-related disease, but this was not enough for a diagnosis of asbestosis. He testified that he had found a pleural thickening and that in his opinion Pool had an asbestos-related pleural disease.

In his prognosis for Pool, Dr. Britton testified that he expected Pool to progress but to get worse with time. He further testified that he had informed Pool that he had a high risk of lung cancer and other asbestos cancers because of his heavy exposure to asbestos products. Dr. Britton also testified that for a worker who had never smoked, the amount of asbestos exposure of these workers had increased their risk of lung cancer to five times the average member of the public.

The only specific evidence about Pool's future medical expenses came from Dr. Britton:

> Q Doctor, with reference to Mr. Pool's future on medical expenses, in reasonable probability what does the future hold for him?
>
> A My opinion is that it's the same for Mr. Sledge and Mr. Strong.

Q Is he at risk of cancer?
A Yes, sir.
Q Is he at risk of mesothelioma?
A Yes, sir.

Appellants contend that the evidence is insufficient to establish probability on the basis of the following:

Q And on Mr. Pool you don't have a clear diagnosis of pulmonary asbestosis yet, but he has a pleural disease?
A Yes, sir.
Q Now, in reasonable probability a person who has a diagnosis of pulmonary asbestosis, as does Mr. Sledge and Mr. Strong, do they have a more than 50 percent chance of developing cancer from asbestos?
A Yes, sir, they do.
Q Is that recognized in the medical authority and recognized by you as a doctor?
A Yes, sir.
Q And is Mr. Pool's risk of the cancer, is it somewhat less but still has the risk?
A That's, that's correct.

Dr. Britton's previous testimony concerning *Sledge's* medical expenses were as follows:

Q Looking at the future, coming to future medical expenses again, and I might remind you again that in reasonable probability is what we have to deal with, what are the probabilities of his (Sledge) future with reference to medical expenses?
A Again a worst case scenario, development of lung cancer, mesothelioma, continuing heart disease, as a result of his asbestos problems, it could easily exceed $100,000 easily.

. . . .

Q And then of course in the absence of cancer, that can go on down to less?
A That's correct.

Dr. Britton further testified that Pool's risk of lung cancer was going down day-by-day and year-by-year because he had quit smoking. The doctor also testified as follows about the probability of Pool's getting cancer:

> Q Doctor, on cancer risks, just a couple of questions to see what we can agree on. Men that have been exposed to asbestos occupationally but do not have asbestosis inside the lungs, you'd agree that there's not a fifty percent risk for that type of individual, such as Mr. Pool?
>
> A Someone who has asbestosis?
>
> Q No. Someone who does not have asbestosis even though he's been occupationally exposed, he doesn't have a fifty percent or greater risk of lung cancer, does he?
>
> A He has a less than fifty percent.
>
> Q Okay. And even if that person has the pleural changes, you're not going to pull him over this fifty percent category?
>
> A No.

The term *reasonable probability* is determined by a consideration of the substance of the testimony of the expert witness and does not turn on semantics or on the use by the witness of any particular term or phrase. *Insurance Co. of North America v. Myers*, 411 S.W.2d 710 (Tex. 1966). However, viewing the record as a whole, we find that the only testimony concerning Pool's future medical expenses came from Dr. Britton. A careful examination of his testimony shows that he based his testimony of Sledge's future medical expenses on a worst-case scenario in which Sledge would develop lung cancer, mesothelioma and heart disease. Thus, his testimony shows what Pool's medical expenses would be if he developed lung cancer, but in other testimony he limits the possibility that Pool will get cancer to less than a fifty percent chance. This specific testimony quantitating his general statement amounts to a likelihood that Pool will not get cancer. The evidence

is not sufficient to establish that Pool's reasonable and necessary future medical expenses in reasonable probability will be $100,000.

No evidence was offered as to what Pool's future medical expenses would be for the absestos-related pleural disease which he was diagonsed as having. Pool contends that Dr. Britton's testimony [while talking about Strong] that "in the absence of cancer, that [the well over $100,000] can go on down to less" is sufficient evidence to support the award. While specificity is not required, this vague reference is not sufficient to support a $100,000 medical award. While we find this constitutes some evidence, we sustain appellants' point of error that this evidence is insufficient.

THE AWARD TO OLLIE FREEMAN

In the next point of error, appellant Garlock contends that the trial court abused its discretion by permitting Donna Freeman and Ollie Freeman to file answers to its requests for admissions. Specifically, Garlock asserts that Donna Freeman and Ollie Freeman "admitted themselves out of court" by failing to timely respond to its request for admissions and by failing to file a motion to extend time for filing a response within the thirty-day period. TEX.R.CIV.P. 169.

After the expiration of thirty days from the date of service, and in the absence of a motion to extend time for filing a response, the admissions are automatically deemed admitted and the trial court has no discretion to deem, or refuse to deem, the admissions admitted. *Curry v. Clayton*, 715 S.W.2d 77, 79 (Tex.App.—Dallas 1986, no writ); TEX.R.CIV.P. 169. The trial court has broad discretion to permit or deny the withdrawal of deemed admissions when the nonanswering party presents sufficient evidence to establish good cause for his failure to make timely answers to the requested admissions. *Boone v. Texas*

Employers' Ins. Ass'n, 790 S.W.2d 683, 688 (Tex.App.—Tyler 1990, no writ). However, the court also must find that the withdrawals can be ordered without causing undue prejudice to the party relying on the admissions and that the presentation of the merits of the action will be subserved by the withdrawal. *Boone*, 790 S.W.2d at 688. The trial court's ruling on the withdrawal will be set aside only upon a clear showing of abuse. *Employers Ins. of Wausau v. Halton*, 792 S.W.2d 462, 464 (Tex.App.—Dallas 1990, writ denied). An abuse of discretion occurs when the court acts without reference to guiding rules or principles or acts arbitrarily or unreasonably, *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985).

In the present case, Garlock filed a request for admissions on August 14, 1989, for plaintiffs Reuben S. Pool, Thomas R. Sledge, Charles W. Strong, Bobbie A. Freeman, Donna G. Freeman and Ollie Freeman. On August 18, 1989, Pool, Sledge, Strong, and Bobbie Freeman filed their responses. Counsel contends, however, that due to a clerical error, Donna Freeman and Ollie Freeman were omitted in the response. On September 21, 1989, eight days after the thirty-day reply period had expired, Donna Freeman and Ollie Freeman filed a motion to answer Garlock's request for admissions, together with their responses, stating that they adopted Bobbie Freeman's answers. During the pretrial hearing, the trial court granted their motion to answer.

Garlock argues that a clerical error is insufficient to constitute good cause for failing to file answers to its request for admissions. However, in *Birdo v. Holbrook*, 775 S.W.2d 411, 413 (Tex.App.—Fort Worth 1989, writ denied), the court held that it was not an abuse of discretion to allow counsel additional time to respond to request for admissions when, due to a clerical error, counsel answered "admit" instead of "deny." Good cause can be shown even though a party may have been negligent, if

his negligence does not rise to the level of conscious indifference. *Halton*, 792 S.W.2d at 466.

The record does not indicate that counsel in the present case consciously disregarded his obligation to timely file its answers to the requests. Counsel filed responses for plaintiffs Pool, Sledge, Strong, and Bobbie Freeman four days after Garlock filed its request for admissions and filed answers for Donna Freeman and Ollie Freeman eight days after the thirty days had expired. This suggests that he was not attempting to avoid discovery. Furthermore, there was no showing that Garlock was unduly prejudiced by the withdrawal of the deemed admissions. We conclude that the trial court did not abuse its discretion by withdrawing the deemed admissions against Donna Freeman and Ollie Freeman. This point of error is overruled.

Appellants next contend that the trial court erred in rendering a judgment in favor of Ollie Freeman because there was no evidence about any person named Ollie Freeman and alternatively, the evidence was insufficient to support the judgment for Ollie Freeman. We will apply the standard for reviewing no evidence points and insufficiency points as previously stated.

Ollie Freeman brought this suit as the surviving mother of Donald Freeman. The voir dire, the opening statements, and the summary of the pleadings and summation identified Ollie Freeman as the mother of Donald Freeman. At trial, Bobbie Freeman, Donald's widow, testified that Donald took care of his eighty-eight-year-old mother. Bobbie stated that Donald would perform various errands for his mother, such as taking her to the doctor and doing repairs for her.

In an action by a parent for the death of an adult child, the mother can recover pecuniary benefits, which include such things as labor, services, advice, and counsel, as well as attention in ministering to the wants and needs of the parent. *P.T. & E. Co. v. Beasley*, 698 S.W.2d 190 (Tex.

App.—Beaumont 1985, writ ref'd n.r.e.). Although Bobbie, in her testimony, did not identify Donald's mother by name, the jury could determine her identity in the context of the trial. The better procedure would have been to identify her by her proper name in the testimony; however, the failure to do so is not fatal. We find that there is sufficient evidence for an award to Donald Freeman's mother, and based upon her status in the proceedings, the jury could properly identify Ollie Freeman as that person. The points of error are overruled.

THE AWARD TO THE WILLIAMS CHILDREN

Next, appellants contend that there was no evidence and, alternatively, insufficient evidence to support the jury's award of $25,000 damages for pecuniary loss and $25,000 damages for termination of parent/child relationship to the Williams children. We have previously discussed the applicable standards of review for addressing these points.

The jury was instructed to consider three elements of damages and make a specific finding on each: (a) pecuniary loss, (b) termination of the parent/child relationship, and (c) mental anguish, past and future, suffered because of the death of their father. No challenge is made to the $50,000 awarded for mental anguish.

The jury also was instructed to "[c]onsider the care, maintenance, support, services, education, advice, counsel, and reasonable contributions of a pecuniary value that [the Williams children] would, in reasonable probability, have received from George Williams, if he had lived." This broad instruction included not only monetary loss, but it asked the jury to value other benefits that the children received from their father.

The instruction regarding the termination of the parent/child relationship directed the jury to "[c]onsider the love, support, companionship, and society that [the

Williams children] would, in reasonable probability, have received from George Williams, if he had lived." In determining wrongful death awards, the Texas Supreme Court stated in *Moore v. Lillebo*, 722 S.W.2d 683 (Tex.1986), that factors to be considered could include (1) the relationship between the parent and child; (2) the living arrangements of the parties; (3) any absence of the deceased from the beneficiary for extended periods; (4) the harmony of the family relationship; and (5) common interests and activities.

Only one child, a son, testified about the relationship between the father and the seven children. His testimony was general and included that his father "pushed the children hard" because he wanted them to excel, that he was a good role model, that he was supportive of the children, and that he was always available to help them with their problems. Williams' wife testified that he was a good family man and was good with the children. Although there are no specifics as to the living arrangements, harmony of the family relationship, or interests or activities, there was no negative testimony in this regard. Evidence of a father who is a good role model and who is always around to help his children, with no evidence to the contrary, is sufficient to support the award of damages. The points of error are overruled.

THE OWENS-ILLINOIS PERCENTAGE OF RESPONSIBILITY

In the next point of error, appellant Owens-Illinois challenges the sufficiency of the evidence for rendition of a judgment against it, based upon the jury's finding that it caused twenty-five percent of the asbestos-related injuries to Sledge and Pool. Owens-Illinois contends that this finding is against the great weight and preponderance of the evidence. We have previously set forth the standard of review for addressing this point. The burden was on Owens-Illinois to prove allocation of causation for its

contribution. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.1984).

Owens-Illinois manufactured an insulation product called Kaylo, which was a hydrous calcium silicate that was roughly fifteen percent asbestos. It was used in molded pipe covering form, as well as in a block. Owens-Illinois sold its insulation division to Owens-Corning Fiberglas Corporation effective April 30, 1958. Reuben Pool did not begin work at the Texas Eastman plant until March 18, 1957. Therefore, he had only been employed for a year and forty-two days when Owens-Illinois sold their unit that manufactured Kaylo. Sledge did not begin working for Texas Eastman until 1958 and only overlapped the period of time that Owens-Illinois made and sold Kaylo by two months.

Owens-Illinois thus takes the position that it caused less than one-hundredth of one percent of Sledge's asbestos-related injury. It cites evidence showing that Sledge was exposed to more than 140 other products that contained asbestos. In the case of Pool, Owens-Illinois cites similar factors and calculates that it should be responsible for less than three one-hundredths of one percent of Pool's asbestos-related injuries. Pool worked with 147 products made by sixteen settling defendants.

There was evidence that Kaylo gave off less than 5,000,000 particles of asbestos per cubic foot (calculated on the basis of forty hours' exposure), but there were no specific figures by which Kaylo can be compared to the the products made by other companies as to how much asbestos the other products contained and how much was given off by each product. There was no medical evidence offered to assist in establishing the percentage of responsibility.

The use and exposure to the Owens-Illinois product cannot logically be said to have terminated on the date that the company quit manufacturing this product. Nothing in

the evidence shows how much of the Owens-Illinois product Texas Eastman may have had on hand for later use at that time. Also, much of the exposure to this type of product occurred when it was torn out and replaced. The tearing out and replacement may have been years after the installation of this product. Without these dates, the specific date that the company sold its manufacturing operation does not establish the date that the exposure to the product ended.

Charles Strong testified that large quantities of Kaylo were used at the Texas Eastman plant.[5] Dr. J.D. Britton testified that a short-term exposure to asbestos could be damaging.[6] The argument by Owens-Illinois is flawed in three respects:

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[5] Strong's specific testimony was as follows:

> Q Was Kaylo one of the big products—a huge amount of products or small amount?
>
> A It was—we used just worlds of Kaylo insulation.
>
> . . . .
>
> Q Did you use a little or a lot of that Owens-Illinois Kaylo?
>
> A We used a lot.

[6] Dr. Britton testified as follows:

> Well, it's important to recognize that asbestosis is something —is a process that doesn't stop when people are not around asbestos fibers; in fact, it continues. Kind of a strange never ending process, it goes on and on and on and on, even though a person may not be around asbestos any more, and this is characteristic. . . . A lot of people do not remember that they did construction work or that they worked in the ship yards or they were a welder or things along those lines, because somebody may have not had much of an exposure at either their work place or at home that happened 40 years ago. People forget about a job they may have had—they may have worked briefly for two or three days, and so I will really stress this point and talk to people and make sure that the history is complete.
>
> Q In connection with that, we've already seen some medical literature or scientific literature on it where they mentioned that just a small amount or small period of exposure years

(1) their responsibility cannot be based upon exposure time alone;

(2) the time when Owens-Illinois stopped manufacturing Kaylo is not necessarily the same time that Pool and Sledge stopped being exposed to their product; and

(3) there is no showing how the amount of asbestos given off by Kaylo compared with the amount given off by the products of other companies.

The evidence does not offer an evidentiary formula whereby the fact finder could make an exact mathematical calculation of the percentage, and asbestos fibers found in the lungs cannot be traced to a specific product. The burden, however, was on Owens-Illinois to show the percentage of responsibility, and we conclude that the evidence does not establish the percentage figures contended by Owens-Illinois. The jury's finding is not against the great weight and preponderance of the evidence. These points of error are overruled.

THE CONSTITUTIONALITY OF PUNITIVE DAMAGES

Appellants next contend that the award of punitive damages violates the due process clauses of the United States Constitution and the Texas Constitution, the excessive fines clause of the Texas Constitution, and the common law of Texas. Appellants have not sought a remittitur to reduce the amount of the punitive damages award.

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ago can be important as a disease producer. Do you recognize that?

A No doubt. Actually, a brief exposure, perhaps one day can stimulate some degree of process.

Q I guess what you're telling us then that the—how many years it's been since your first exposure and then the total amount of the exposure both are important?

A That's correct.

In *Pacific Mutual Ins. Co. v. Haslip* [sic], 553 So.2d 537 (Ala.1989), *aff'd* —— U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the United States Supreme Court held that punitive damage awards do not violate the due process provision of the fourteenth amendment when the award is based on an objective criterion. The Supreme Court conceded that unlimited jury or judicial discretion in the fixing of punitive damages may invite extreme results that are unacceptable under the due process clause. *Id.* Therefore, the general concerns of reasonableness and adequate guidance from the court must be considered in determining whether punitive damages are unconstitutional. *Id.*

In the present case, the trial court's instruction placed reasonable constraints on the exercise of the jury's discretion by defining exemplary damages as an amount awarded to set an example to others and as a penalty. The charge also required the jury to find that appellants' acts were done "willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights, welfare, or safety of the persons affected by it" before awarding exemplary damages to the appellees. We conclude that the punitive damage award was based on an objective criterion, and thus, the due process provision of the fourteenth amendment was not violated.

The United States Supreme Court held in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), that the excessive fines clause of the eighth amendment does not apply to awards of punitive damages in civil cases between private parties. The Texas Supreme Court has held that a civil penalty is excessive, and thus unconstitutional, when it becomes so manifestly violative of the constitutional prohibition against excessive fines as to shock the sense of mankind. *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex.1980).

In the *Pennington* case, the Texas Supreme Court considered whether punitive damages violated Article 1, § 13 (excessive fines) of the Texas Constitution and the fourteenth amendment (due process) of the United States Constitution. The court held that whether such damages are excessive is determined by whether it was fixed with reference to the object it is to accomplish according to the seriousness of the wrong and the defendant's culpability.[7]

This constitutional test is in conformity with the factors for determining if a punitive damages award is excessive, set forth by the court in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex.1981). Pursuant to the *Alamo National Bank* decision, the tral court must consider (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties, and (5) the extent to which the defendant's conduct offends the public's sense of justice and propriety.

Appellant Owens-Illinois argues that the award of punitive damages punishes today's shareholders, management and employees for "the alleged sins of management in place forty to fifty years ago." The law recognizes Owens-Illinois as a corporate entity, and as such it must be liable for its damages. Its liability cannot be diminished or removed each time there is a change in management or employees or stock is sold.

Owens-Illinois contends that it is now litigating more than 70,000 asbestos claims and that it left the asbestos-containing insulation business more than thirty years ago. It points out that the Fifth Circuit stated, "the scope of this mass litigation is without precedent and practically

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[7] The Corpus Christi Court of Appeals recently held in *Celotex Corp. v. Tate* that in the absence of any state action, the excessive fines provision of the Texas Constitution does not apply to an award of common law punitive damages. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 208 (Tex. App.—Corpus Christi 1990, no writ).

without dimension." *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524-25 (5th Cir. 1984), *rehearing en banc*, 750 F.2d 1314 (1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986). The evidence, however, also indicates that a unprecedented number of workers will die from asbestos-related cancer.

The wrongful conduct was a failure to warn about the use of a product which could result in serious illness and death by suffocation, and we cannot conclude that punitive damages of an approximately one-to-one ratio with actual damages are such that would shock the sense of mankind. In relationship to the actual damages and the nature of the wrong, as well as the other factors, the record supports the award of punitive damages.

Fibreboard and Owens-Illinois contend that we must look at the multiple imposition of punitive damages against defendants in asbestos cases. They contend that substantive due process prevents multiple imposition of punitive damages for the same conduct or course of conduct, citing *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir.1989); *In re School Asbestos Litigation*, 789 F.2d 996 (3rd Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir.1990). While the courts in these cases discuss in some detail the problems inherent in allowing punitive damages in the voluminous asbestos cases, none of the courts has held that awarding such damages violates substantive due process.

The thrust of the appellants' arguments is that repeated puntive damages awards in numerous cases go beyond punishment and allow windfalls for the plaintiffs. They also endanger the rights of future claimants to recover actual damages. Owens-Illinois contends in its brief that it has been subjected to punitive damage awards of more than $4,000,000 for its manufacture and sale of Kaylo insulation products. While we recognize that there are numerous

cases that have been decided and numerous cases are pending concerning damages claims based upon exposure to asbestos, this Court cannot dictate policy in a mass tort context, but can only decide the cases involved in the present suit. Such broad policy considerations are left to the Supreme Court of this state and the United States and to the appropriate legislative bodies.

We find no constitutional violations and no support or authorities for the appellants' contention that the punitive damages award violated the common law. Every state and federal court that has considered the question of whether punitive damages are unconstitutional has ruled that the common-law method for assessing punitive damages does not in itself violate due process. *Pacific Mutual Ins. Co.*, 553 So.2d 537 [sic], *aff'd* —— U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1. These points of error are overruled.

GARLOCK'S LIABILITY

In the next point of error, appellant Garlock contends that there was no evidence or insufficient evidence to show that the products manufactured by Garlock were defective, unreasonably dangerous, and contributed to the injuries of Pool, Strong, Sledge, and Freeman. We shall apply the standards for reviewing no evidence and insufficient evidence points as previously stated.

Garlock contends that their products are not unreasonably dangerous and, therefore, are not defective. Garlock contends that it had no duty to warn of dangers which did not exist. Garlock has never manufactured or sold asbestos insulation. This company manufactures gaskets and valve packing, some of which contain small amounts of asbestos in rubber, elastomers, and lubricants. The evidence shows that these products in their initial application release no asbestos particles into the air, but a small number of particles may be released when it is cut. The amount of asbestos released is far below the govern-

ment standard. The court held in *Gideon*, 761 F.2d 1129, that compliance with government safety standards constitutes strong and substantial evidence that a product is not defective. The federal courts have used this standard on the basis that they were applying Texas law, but we have found no Texas cases, other than diversity cases in federal court, to so hold. *See Lorenz v. Celotex Corp.*, 896 F.2d 148 (5th Cir.1990). Under Texas law, a manufacturer's complaince with a government safety standard does not automatically preclude a finding of liability.

Appellees point to evidence from an article published in 1931 in a journal called *Safety Engineering*. The article, "The Very Least An Employer Should Know About Dust and Fume Diseases" indicated that exposure to asbestos in any form is dangerous. They also point to evidence from the expert witness, Dr. Joseph Wagner, in which he stated that it was known in the 1920's that asbestos is a disease-causing mineral which causes asbestosis and also many types of cancer, including lung cancer, pleural mesothelioma, and perierdial mesothelioma. The evidence also showed that there is no safe level of asbestos exposure.

Manufacturers that know or should know of potential harms to a user because of the nature of their products are required to give adequate warnings of such dangers. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978). When a product contains toxic or dangerous ingredients not obvious to the typical user, the manufacturer has a duty to know the danger and to issue an appropriate warning. *Muncy v. Magnolia Chemical Co.*, 437 S.W. 2d 15 (Tex.Civ.App.—Amarillo 1968, writ ref'd n.r.e.). Section 402A, comment K of the Restatement of Torts defines an unavoidably unsafe product as those that are incapable of being made safe for their ordinary and intended use according to the scientific knowledge at that time, and the failure to give adequate warnings under these circumstances renders the product unreasonably

dangerous. *Borel*, 493 F.2d at 1089; RESTATEMENT (SECOND) OF TORTS § 402A, comment K (1965). A product, therefore, can be defective if the design is not sufficiently safe or if the product does not have adequate instructions or warnings. *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 346 n.1 (5th Cir.1983). When a product has no warning, a presumption exists that the plaintiff would have read and heeded a proper warning had one been given. *Howard v. Faberge, Inc.*, 679 S.W.2d 644, 650 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

The record contains testimony from Charles Strong, who worked at Texas Eastman, and Charles Flint, the purchasing agent for Texas Eastman, that Texas Eastman purchased and used Garlock products consisting of asbestos sheet packing and square-braided asbestos packing. Strong testified that Garlock products had to be replaced and when being replaced were dusty. Strong also testified that when removing the worn-out packing material, it was necessary to scrape, beat and pull on it. There was testimony that the asbestos sheet packing had to be cut to be used and was used in all the buildings in Texas Eastman. He further testified that every time the material was cut, dust and fibers were released. Although there was no expert testimony concerning the contents of the dust, the jury could infer that the dust formed from a material containing asbestos would also contain asbestos.

There was expert testimony that the cumulative exposure to asbestos causes asbestos-related diseases and that even the inhaling of small amounts of asbestos can contribute to the disease process. There also was evidence that Garlock failed to warn the appellees of the dangers of their products and that the appellees' injuries were caused by exposure to asbestos. We find that there was sufficient evidence to support the findings against Garlock. These points of error are overruled.

FLINTKOTE'S LIABILITY

Next, appellant Flintkote contends that the evidence was insufficient to support the jury verdict against Flintkote. Flintkote challenges the evidence on the basis that its products did not pose any danger nor did Flintkote know or have any reason to know of any supposed danger in its products. We have previously discussed the applicable standard for review. Flintkote cites the fact that there was no evidence concerning any danger from liquid asbestos products that Flintkote manufactured. Flintkote states the fact that none of the experts mentioned Flintkote by name or referred to any liquid products. It also argues that most of the expert testimony referred to raw asbestos and asbestos insulation products. The testimony showed that Flintkote products were used as adhesives and joint compounds to seal joints and to place a thermal coat over the pipe insulation. The product came premixed in a liquid form in five-gallon buckets or fifty-five-gallon drums and in that form emitted no dust.

It cannot be presumed that all asbestos-containing products are unreasonably dangerous or that all companies have a duty to warn of supposed dangers. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir.1982); *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1188-89 (5th Cir.1981).

Flintkote is correct that there was no expert testimony specifically stating that the Flintkote products emitted a dust containing asbestos fibers. There was no dispute that the Flintkote product was liquid at the time of its application. Strong testified as follows:

> Flintkote made some adhesion compound, they also made some joint compound, they also made a thermal coat which we used everyday. . . . It was waterproofing cement that we put on elbows, on vessels, after we had insulated them with regular cement for

weatherproofing. When this stuff dried and you went back to tear it off is where you got your problem.

. . . .

You got dust and stuff flying. *Anything that dries in asbestos, it forms a solid substance* that when you start beating it with hammers or stuff like that, you got dust from it.

. . . .

Q Was there any way to escape that dust if you were working with it?

A Oh, no, sir. Not in the areas we had to work in with it.

(Emphasis added.)

The evidence shows that Flintkote did not warn the appellees of the dangers of asbestos and that it did not test its products for the harmful effects of asbestos. There was sufficient evidence to show that the appellees inhaled the dried Flintkote product when it became dust and that the product contained asbestos. The jury had before it expert testimony showing the dangers of inhaling asbestos products.

Flintkote specifically argues that the evidence did not show that George Williams worked with Flintkote products. James Henry Read testified, "I remember the Flintkote name but I'm not sure about their product. I'm just not sure about that one. I know we used some cements put out by them and some insulation coatings." The testimony indicates that Williams worked at Texas Eastman as an ironworker and insulator, and thus the jury could have inferred that he was exposed to the same products as the other appellants working at that job site. This included the Flintkote products.

Both Garlock and Flintkote contend that if the appellees suffered from asbestos-related injuries, the causation was obviously the dust from the crumbling insulation prod-

ucts of other companies. However, the record is undisputed that their products also emitted a dust after it became dry and that such dust was inhaled by the workers when removing their products. The emission of asbestos dust when removing the dried products was a forseeable problem. The testimony about how little asbestos the product gave off in its initial form did not refer to the emission of dust during the removal of these products. The points of error are overruled.

PUNITIVE DAMAGES AGAINST GARLOCK, FLINTKOTE, AND FIBREBOARD

Appellants Garlock, Flintkote, and Fibreboard contend that there was no evidence or, alternatively, that there was insufficient evidence to support the jury findings of punitive damages. Punitive damages are assessed to punish the mental attitude of the defendant, as opposed to its conduct. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex.1981). A plaintiff may prove the defendant's gross negligence by either showing: (1) that the defendant had actual subjective knowledge that his conduct created an extreme degree of risk; or (2) that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others. *Williams v. Steves Industries*, 699 S.W.2d 570 (Tex.1985). It is not necessary to prove a defendant's subjective state of mind by direct evidence. *Williams*, 699 S.W.2d 570. There is ample evidence in the record to show that as early as the 1920's there was a general knowledge among the manufacturers in the asbestos industry concerning the dangers of asbestos. Most of the evidence pertained to asbestos insulation and raw absestos. Although there was no direct evidence that Fibreboard was aware of these dangers, the jury had sufficient evidence under a reasonable person standard to have inferred that these companies had knowledge of the dangers of asbestos. Fibreboard manufac-

tured an insulation product which inherently produced a dust with high levels of asbestos. From the surrounding circumstances, the jury had sufficient evidence to infer that Fibreboard's decision not to warn the users of the dangers of its products was made with conscious indifference to the potential injuries to the users and that this conduct created an extreme risk.

The evidence indicates that the products made by Garlock produced a very small amount of asbestos fibers, and at all times the amount of fibers was far below the governmental standards (1,000 times safer than the 1972 OSHA regulation and 40 times safer than the current OSHA regulation). This included the standard adopted by the State of Texas in 1958. Appellees correctly contend that Garlock had an affirmative duty, commensurate with the potential dangers, to test its products before selling them *Dartez*, 765 F.2d 456. Appellees contend that because Garlock did not test its products until 1983, it was grossly negligent. The record does show that Garlock conducted a study of its products in 1983; however, it does not support the appellees' position that this was the earliest study made by Garlock. The record further established that studies of similar products were made by other entities, which showed that the concentration of asbestos fibers was extremely low. We find no evidence of surrounding circumstances that rises to the level that is required to show that Garlock made a conscious decision not to warn about the dangers of its products.

Flintkote has not pointed out any evidence that the levels of asbestos in its products met any standards, but it contends that as a liquid product it did not emit any respirable asbestos fibers. As previously discussed, there is evidence that shows that its product could be inhaled once it becomes dry and powders into dust. Although Flintkote was aware that its company manufactured a product containing asbestos, it admitted that it had never conducted a study as to the level of asbestos fibers that

might be emitted into the air in the process of removing this dried product. Its conduct, therefore, could have been found by the jury to have been one of conscious indifference to those who worked with the product. Thus, there was sufficient evidence from the surrounding circumstances to support the jury's findings of gross negligence on the part of Fibreboard and Flintkote. This point of error is overruled as to Fibreboard and Flintkote. Because there was no evidence that rose to the level of showing a conscious indifference on the part of Garlock, the point of error is sustained, and the exemplary damages awarded against it will be set aside.

FLINTKOTE'S OPENING STATEMENT

Appellant Flintkote next contends that the trial court erred in refusing to allow it to make an opening statement to the jury at the beginning of its case-in-chief. The proper limitation of the opening statement is a matter within the discretion of the trial court, subject to review only for abuse of discretion. *Ranger Insurance Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. Civ.App.—Austin 1975, writ ref'd n.r.e.).

Flintkote contends that the ruling of the trial court that the appellants could not split their opening statement denied it an opportunity to point out to the jury the difference between its liquid products and the insulation products of the other defendants while the plaintiffs' evidence was still fresh in the jury's mind. Rule 265 of the Texas Rules of Civil Procedure sets forth the order in which a trial is to proceed. Section (a) permits the party adverse to the plaintiff to make an opening statement prior to either side introducing any evidence, or a party may come under section (c) and make an opening statement prior to the introduction of evidence by the adverse party. The trial court did not rule that the defendants could not exercise either option, but ruled that they could not do both by having some defendants speak at the be-

ginning of the trial and others later on in the proceeding. In a trial involving numerous parties, this ruling was not an abuse of discretion. Furthermore, Flintkote did not object to the ruling when it was made, and thus did not preserve the right to complain about the error, if any. The point of error is overruled.

JURY QUESTIONS ON SETTLING AND NONSETTLING DEFENDANTS

Appellants next contend that the trial court erred in submitting two identical sets of jury questions regarding liability and causation based on the status of the defendants, settling or nonsettling. In the first set of questions, the nonsettling defendants were referred to as defendants and in the second set of questions, the settling defendants were referred to as companies. Appellants objected to this double submission and requested that one set of questions, listing all defendants alphabetically, be submitted.

The Texas Supreme Court has held that the submission of multiple issues raising the same factual inquiries, whether identical in language or merely in form, is erroneous. *Holmes v. J.C. Penny Co.*, 382 S.W.2d 472, 473 (Tex.1964). In *Holmes*, the court was concerned with a multiple submission of a single theory of recovery by slightly varying jury questions, all of which raised the same factual inquiry. In the present case, the same factual inquiries were submitted against each asbestos manufacturer only once. Furthermore, the jury was aware of the identities of the parties to the litigation, and the separation into two issues reflected those identities and could not be deemed to imply anything else. In addition, the settling and nonsettling defendants were listed together in one issue for the jury's determination of each party's percentage of comparative causation. *See Duncan*, 665 S.W.2d at 427, n. 8. The trial court did not err in separating the issues as to settling and nonsettling defendants. The points of error are overruled.

In the next points of error, appellants contend that the jury's answers to Questions No. 8 and 16 are against the great weight and preponderance of the evidence. We have previously discussed the applicable standard of review for addressing this point. In Question No. 16, the jury apportioned twenty percent of liability to two settling defendants (Owens-Corning Fiberglas and Baldwin-Ehret-Hill) which were found in Question No. 8 to have supplied asbestos-containing products causing appellees' injuries. Appellants urge that a new trial should be granted because the jury failed to find any exposure or liability with respect to sixteen defendants that either settled with the plaintiffs or were absent from the trial.

A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused their injury. *Gaulding*, 772 S.W.2d at 68. If there is sufficient evidence presented by appellees showing that appellants supplied *any* of the asbestos to which appellees were exposed, then appellees have adequately met their burden of proof. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 204 (Tex. App.—Corpus Christi 1990, no writ). When the plaintiff's injuries are not necessarily caused by one defendant's products, the burden of proof as to apportionment shifts to the defendants. *Celotex Corp. v. Tate*, 797 S.W.2d at 204; RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).[8] If any defendant is held strictly liable, all defendants shall be liable to the plaintiff jointly and severally for the entire amount, but as among themselves, each of the defendants is to be held liable only for its percentage share in causing the injury. *Moore v. Johns-*

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[8] RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965) states that:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Manville Sales Corp., 781 F.2d 1061, 1063 (5th Cir. 1986); *Duncan*, 665 S.W.2d 414.

In the present case, the evidence reflects that while working at Texas Eastman appellees were exposed to asbestos-containing products manufactured by appellants. Appellee Strong specifically identified using products manufactured by all of the appellants, as well as Owens-Corning Fiberglas and Baldwin-Ehret-Hill. Sledge and Pool also testified to using these products.

The deposition testimony of witnesses Virgil M. Evans and James Henry Read established identification of the asbestos-containing products to which Williams was exposed. Evans and Read stated that Williams used products manufactured by all appellants, except Garlock, Owens-Corning Fiberglas, Baldwin-Ehret-Hill, and Eagle-Pincher Industries. As to the other manufacturers, Evans and Read either had conflicting testimony or they were uncertain whether Williams had used any of the products.

As stated *supra*, no evidentiary formula was presented for the jury to make an exact mathematical calculation of the percentage of asbestos contained in each manufacturer's products. Appellants had the burden to show the percentage of causation to be allocated to each manufacturer. We conclude that the finding of the jury was not so against the great weight and preponderance of the evidence as to be unjust. These points of error are overruled.

RELEVANCE OF DEPOSITIONS TO FLINTKOTE AND GARLOCK

Appellants contend that the trial court committed error by admitting without limiting instruction five depositions taken in cases in which Flintkote and Garlock were not parties and which had no relevance to Flintkote and Garlock.

At trial, Flintkote and Garlock objected to the depositions on the basis that they were not relevant and were highly prejudicial because Flintkote and Garlock did not manufacture insulation products. Flintkote correctly points out that the deposition of Dr. Kenneth Smith discusses the dangers known to Johns-Manville; that the deposition of Dr. Barry Castleman discusses the knowledge of Owens-Illinois regarding the dangers posed by asbestos dust from their products; that the deposition of Dr. Thomas Mancuso relates to the dangers of Philip Carey Insulation products; that the deposition of Dr. Arthur Mueller is testimony showing that Mueller was unaware of the dangers explained by Mancuso; and that the deposition of Dr. Richard Gaze concerns Pittsburgh Corning's knowledge of the dangers of asbestos. All of these depositions are relevant to show the knowledge in the industry generally of the dangers of asbestos and are admissible on that issue.

Garlock asked for a limiting instruction to the effect that this evidence was not to be considered for any purpose against Garlock at the trial. Flintkote adopted that motion. The trial judge correctly denied the motion because the evidence was admissible and relevant to what scientific knowledge was available to those companies at that time in regard to the dangers of asbestos. These points of error are overruled.

Garlock also complains that these depositions were inadmissible as hearsay because they were taken in a suit in which Garlock was not a party. The only hearsay objection made to any of these depositions during the trial was by the attorney for Celotex, who objected to the depositions of Dr. Kenneth Smith and Richard Gaze on the basis of hearsay. The trial court permitted an objection by any of the attorneys to inure to the benefit of the other attorneys. However, Garlock has presented no argument, discussion, or authorities concerning its complaint about the hearsay objection. This point of error is overruled.

WORDING OF JURY QUESTION ON PUNITIVE DAMAGES

Next, appellants contend that the trial court erred in submitting the jury questions relating to the assessment of punitive damages "for the injuries of" appellees Pool, Sledge, and Strong and "for the death of" Freeman and Williams. They argue that this question permits a double recovery for compensatory damages by focusing the jury's attention on the appellees and their injuries rather than on the misconduct of the appellants.[9] Furthermore, they argue that the question assumes the appellees sustained injuries for which each company should pay and that this amounts to an impermissible comment on the weight of the evidence and assumes the truth of material, controverted facts. *See Alvarez v. Missouri-Kansas-Texas Railroad Co.*, 683 S.W.2d 375, 377 (Tex.1984).

Special issues are to be worded so as to avoid assuming the truth of a material, controverted fact. *Alvarez*, 683 S.W.2d 375. The charge in the present case did not predicate the damage questions on affirmative findings of liability, but the questions did contain the savings clause "if any." The phrase "if any" was used twice in the jury issue in question, once stating "for his injuries, if any, . . ." and again "Answer separately in dollars and cents, if any, ..." The use of this term neutralizes the language which the appellates contend constituted a comment by the court on the weight of the evidence. *See Sharpe v. Safway Scaffolds Co. of Houston*, 687 S.W.2d

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[9] An example of the question which is the subject of the appellants' complaint is as follows:

> Find from a preponderance of the evidence what sum of money, if any, should be assessed against each of such companies as exemplary damages for the injuries of Reuben Pool.
>
> "EXEMPLARY DAMAGES" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages.

386 (Tex.App.—Houston [14th Dist.] 1985, no writ); *Pace v. Gutierrez*, 492 S.W.2d 356 (Tex.Civ.App.—Amarillo 1973, writ ref'd n.r.e.); *Loughry v. Hodges*, 215 S.W.2d 669 (Tex.Civ.App.—Fort Worth 1948, writ ref'd n.r.e.).

Appellants are correct that the punitive damages are for the misconduct, *Graham v. Roder*, 5 Tex. 141 (1849); *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex.App.—Texarkana 1987, no writ), but it is difficult to believe that the jury was misled. The definition of exemplary damages instructed the jury that these damages were to be an example to others and a penalty or a punishment and that the amount is in addition to actual damages. Under the terms of this definition, it is difficult to believe that the jury could base its findings on anything other than the conduct which caused the injuries. The jury questions on Freeman and Williams follow the standard format of 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 81.06, 82.03 (1990), which ask what sum of money should be assessed against the defendant "as exemplary damages for the death of [name]?" This language is similar to the language used in the present case asking for exemplary damages for the injuries of Pool, Sledge, and Strong. This language does not focus the jury's attention on the appellees and their injuries to such an extent that it led to double recovery. There is no error. The point of error is overruled.

THE ADMISSIBILITY OF THE CANTLON LETTER

Appellant Celotex next contends that the trial court erred in refusing to admit a letter written by John Cantlon to Michael Cojohn. The appellees objected to the letter as being hearsay. The letter was offered for the truth of the matter stated therein, but Celotex contends that it falls within exceptions to the hearsay rule because it was essential to rebut evidence offered by appellees and because it qualifies as an ancient document. Celotex

points to the fact that a number of letters by Cantlon were introduced by the appellees in Dr. Mancuso's deposition testimony. However, no objections were made to the introduction of these letters. To qualify as an ancient document under TEX.R.CIV.EVID. 901(b)(8), the evidence must show that the document is in such condition as to create no suspicion concerning its authenticity, that it was in a place where it would likely be if it were authentic, and that it has been in existence twenty years or more at the time it is offered. If such a predicate is laid, it is admissible as an exception to the hearsay rule under TEX.R.CIV.EVID. 803(16). No predicate was laid as to where this letter had been kept, and therefore, it did not qualify under the ancient document rule. The point of error is overruled.

EXCLUSION OF EVIDENCE ABOUT INSOLVENT DEFENDANTS

In the next point of error, appellant Flintkote contends that the trial court erred in excluding its offer of evidence regarding Johns-Manville [10] and other companies. Flintkote contends that by this evidence it could have shown that Johns-Manville, and not Flintkote, caused injuries to the appellees. Flintkote contends that if the jury had heard about the appellees' extensive exposure to Johns-Manville products, the fact finder would have reached the conclusion that any exposure to Flintkote's

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[10] Owens-Illinois states in a footnote that the trial court denied its motion to sue Johns-Manville trust, but this was not complained about in a point of error. A third-party petition is in the record against Johns-Manville Corporation Asbestos Disease Compensation Fund with a certificate of service dated August 14, 1989. An order overruling Defendants' Motion to Join Third Party Defendant Johns-Manville was signed by the court September 8, 1989. The plaintiffs never named Johns-Manville in any form as a defendant. On October 25, 1989, the court signed an Order of Dismissal As To Johns-Manville Sales Corporation, Manville Personal Injury Settlement Trust, Manville Corporation And All Its Entities And Thorpe Products Company.

products was *de minimis* and thus no causal factor of appellees' injuries. Appellees take the position that Johns-Manville was in bankruptcy court, that any claims for contribution from that company should be asserted by the defendants in the bankruptcy, and that its insolvency must be borne by the solvent tortfeasors.

In *Duncan*, 665 S.W.2d 414, the Texas Supreme Court determined that the defendants in a products liability case were to be jointly and severally liable for the entire amount that the plaintiff is entitled to recover, subject to the right of contribution. Thus, the insolvency of co-tortfeasors must be borne by the solvent co-tortfeasors.

In the case of *Gideon*, 761 F.2d 1129, the court held that evidence of the plaintiff's exposure to products of insolvent manufacturers was not material to the litigation, so long as the jury found that the products of each solvent defendant was a producing cause of the plaintiff's injury and that rights between the solvent and insolvent defendants would be determined in some subsequent proceedings. In a contrary holding, in *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858 (5th Cir.1983), the court held that it was reversible error not to admit evidence about an employer's conduct in a products liability proceeding to allow the manufacturer to show the employer's responsibility for the injury. The plaintiff argued in that case that the conduct of the employer could not be the sole cause of her injuries, but the court held that this was a defense which the defendants were entitled to assert. In the case of *Herrera v. FMC Corp.*, 672 S.W.2d 5 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), the court held that evidence offered by the manufacturer about the conduct of the employer (who was not a party to the suit) was properly admitted to support the manufacturer's allegation that the sole proximate cause of the plaintiff's injury was the misuse or abuse of the manufactured product.

In the case of *Laney v. Celotex Corp.*, 901 F.2d 1319 (6th Cir.1990), the court found that the trial court erred

in not allowing the defendant to offer testimony as to the fiber content of other asbestos products of companies not a party to the suit. The court found that the defendant could rebut the plaintiff's theory that the defendant's product was a substantial factor in causing the plaintiff's injury by offering evidence of exposure to another company's product. The court held that this evidence went to the fundamental question of cause and allowed the jury to consider all the contributing factors to determine which, if any, were substantial factors in causing the plaintiff's injury. In the *Laney* case, the court found that the trial court abused its discretion in excluding this evidence under TEX.R.CIV.EVID. 403. Rule 403 permits the trial court to exclude relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues or if the evidence would mislead the jury.

We agree with the court in *Laney* that it was an abuse of discretion to exclude testimony about causation, even if it pertained to insolvent parties. However, we must determine whether this exclusion in the present case constituted reversible error pursuant to TEX.R.APP.P. 81(b), which requires that the error be such a denial of the appellant's rights as to have been reasonably calculated to cause and probably did cause a rendition of an improper judgment.

Flintkote did not contend or plead at the trial that Johns-Manville or the other insolvent companies were the sole cause of the plaintiffs' injuries, but it did plead generally that their injuries were "due solely to disease and/or other causes for which this defendant is not responsible." No evidence was offered in the bill of exceptions to establish that Johns-Manville and the other insolvent companies were the sole cause of the injuries. The bill of exceptions was comprised of Strong's testimony that he breathed the asbestos products of the insolvent companies just as he had breathed the products of the

defendants. The evidence showed that these insolvent companies were joint tortfeasors with the defendants, and the evidence would not have supported a fact-finding that the insolvent defendants were the sole cause of the plaintiffs' injuries. A finding by the jury that these insolvent companies were joint tortfeasors contributing to the plaintiffs' injuries would not in any way mitigate the liability of the appellants. Therefore, the failure of the trial court to admit this evidence was not reversible error.

The record shows that the trial judge took judicial notice of the bankruptcy. Pursuant to Rule 201 of the Texas Rules of Civil Evidence, the court can take judicial notice of a fact which is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The bankruptcy status of Johns-Manville was capable of accurate and ready determination by inquiry to the bankruptcy court. There were no objections to the trial court's taking judicial notice of this matter, although there were a number of withdrawals from the initial stipulation. There is nothing in the record to show that the court's taking of judicial notice was incorrect. The point of error is overruled.

CUMULATIVE ERROR

Appellants contend that the cumulative effect of errors in the case deprived them of their right to a fair trial and due process under the law. When several errors exist but are not considered reversible, all errors considered together could present cumulative error requiring reversal. *Klein v. Sporting Goods, Inc.*, 772 S.W.2d 173, 179 (Tex. App.—Houston [14th Dist.] 1989, no writ). To determine if a cumulation of errors denied the appellants their right to a fair trial and due process of law, all errors in the case will be considered along with the record

as a whole to determine if the errors collectively were calculated to cause and probably did cause the rendition of an improper judgment. *See* TEX.R.APP.P. 81(b)(1).

Garlock attached a chart showing that the trial court sustained a much higher number of appellees' objections than it did appellants' and that the trial court overruled far more of the appellants' objections than it did the appellees'. The sustaining and overruling of objections is not done by quotas, but must be based upon the merit of each objection. On appeal, this Court must consider only those errors which we have found to have been preserved. There are few errorless trials, especially those of the length of this proceeding. We have reviewed the record, and we do not find cumulative errors that would have probably caused the jury to have rendered a verdict in favor of the appellants. This point of error is overruled.

We, therefore affirm the judgment in Cause No. 6-90-022-CV (pertaining to Williams only). In Cause No. 6-90-014-CV (pertaining to Pool, Strong, Sledge, and Freeman), because an insufficient evidence point has been sustained on the award of future medical for Pool. Pool's cause of action must be severed and remanded for a new trial on all issues, unless Pool elects to make a voluntary remittitur of $100,000 (the amount of the future medical award) under TEX.R.APP.P. 85(e). If Pool elects to make a remittitur within fifteen days, the judgment for the remainder of damages for Pool will be affirmed, except for the exemplary damages against Garlock. If Pool does not file a remittitur, the judgment on Pool's cause of action will be severed and remanded for a new trial on all issues. The exemplary damages against Garlock are hereby set aside as to all parties. The remainder of the judgment in Cause No. 6-90-014-CV is affirmed.

APPENDIX D

IN THE DISTRICT COURT
4TH JUDICIAL DISTRICT
RUSK COUNTY, TEXAS

No. 86-363

REUBEN S. POOL and LEE POOL, *et al.*

vs.

FIBREBOARD CORPORATION, *et al.*

No. 88-08-293

LESSIE L. WILLIAMS, RALPH E. WILLIAMS, ROBERT E. WILLIAMS, CARROL A. PURDY, MURRAY W. WILLIAMS, CINDY L. POWDRILL, BOBBIE S. PHILIPPS, EMORY G.L. WILLIAMS and PATSY R. FOUNTAIN

vs.

FIBREBOARD CORPORATION, *et al.*

THE COURT'S JUDGMENT

On October 2, 1989, these five cases came on for trial as consolidated by Order of the Court:

Under File No. 86-363, Reuben S. Pool and Lee Pool, Charles Strong and Nancy Strong, Thomas Sledge and Betty Sledge, and Bobbie Freeman, et al, and under File No. 88-08-293, Lessie Williams, et al.

The parties all appeared and announced ready for trial and the case proceeded to trial before a jury of twelve duly impaneled, questioned and sworn jurors. Thereafter, on October 18, 1989 at 9:00 a.m., the jury

retired to deliberate upon its verdict and on October 19, 1989 at 10:30 a.m. the jury returned into open court five separate verdicts, one as to each group of plaintiffs.

As to each of the plaintiffs, the jury found that defendants, The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., failed to adequately and timely warn of unreasonably dangerous defects in each of their asbestos-containing products. The jury also found that the acts of each such defendant were done willfully, intentionally or with a callous and reckless disregard and indifference to the rights and welfare of the plaintiffs and others similarly situated. Conditioned upon that finding, the jury assessed punitive damages as to each of the named defendants, after assessing actual damages as to each plaintiff.

The other necessary and material finding in the Strong, Pool, Sledge and Freeman cases was that the acts and conduct of two other former defendants were tortious and contributed to the damages in the combined amount of 20%. The contribution amount (combined) found by the jury in the Williams case of two other former defendants was 28%.

Based upon the verdicts of the jury, on the motion of the plaintiffs, and upon such findings as the Court is authorized to make from the record, it is ORDERED AND ADJUDGED by the Court:

Charles Strong shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, these amounts (taken from Plaintiffs' Motion for Judgment and from the jury verdict, each of which is on file):

Actual damages with computed pre-judgment interest (Joint and Several Judgment against the above-named six defendants)	**$719,050.00**

It is also the JUDGMENT of the Court that Charles Strong shall have and recover as punitive damages (based upon the jury's punitive damage findings) these amounts from the individual defendants, this award being a separate Judgment as to each of the named defendants:

The Celotex Corporation	**$250,000.00**
The Fibreboard Corporation	**$125,000.00**
Owens-Illinois, Inc.	**$250,000.00**
The Flintkote Company	**$125,000.00**
H. K. Porter Company, Inc.	**$125,000.00**
Garlock, Inc.	**$125,000.00**

It is ORDERED AND ADJUDGED by the Court that Nancy Strong shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, the sum of $43,370.00 based upon the jury verdict and Plaintiffs' Motion for Judgment.

All of such amounts adjudged to Charles Strong and Nancy Strong shall bear interest from the date of this Judgment at the rate of 10% compounded annually.

It is ORDERED AND ADJUDGED by the Court that Reuben Pool shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, these amounts (taken from Plaintiffs' Motion for Judgment and from the jury verdict, each of which is on file):

Actual damages with computed pre-judgment interest (Joint and Several Judgment against the above-named six defendants)	**$615,602.00**

It is also the JUDGMENT of the Court that Reuben Pool shall have and recover as punitive damages (based upon the jury's punitive damage findings) these amounts from the individual defendants, this award being a separate Judgment as to each of the named defendants:

The Celotex Corporation	**$250,000.00**
The Fibreboard Corporation	**$125,000.00**
Owens-Illinois, Inc.	**$250,000.00**
The Flintkote Company	**$125,000.00**
H. K. Porter Company, Inc.	**$125,000.00**
Garlock, Inc.	**$125,000.00**

It is ORDERED AND ADJUDGED by this Court that Lee Pool shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, the sum of $43,715.50 based upon the jury verdict and Plaintiffs' Motion for Judgment.

All of such amounts adjudged to Reuben Pool and Lee Pool shall bear interest from the date of this Judgment at the rate of 10% compounded annually.

It is ORDERED AND ADJUDGED by the Court that Thomas Sledge shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, these amounts (taken from Plaintiffs' Motion for Judgment and from the jury verdict, each of which is on file):

Actual damages with computed pre-judgment interest (Joint and Several Judgment against the above-named six defendants)	**$718,725.00**

It is also the JUDGMENT of the Court that Thomas Sledge shall have and recover as punitive damages (based upon the jury's punitive damage findings) these amounts from the individual defendants, this award being a separate Judgment as to each of the named defendants:

The Celotex Corporation	**$250,000.00**
The Fibreboard Corporation	**$125,000.00**
Owens-Illinois, Inc.	**$250,000.00**
The Flintkote Company	**$125,000.00**
H. K. Porter Company, Inc.	**$125,000.00**
Garlock, Inc.	**$125,000.00**

It is ORDERED and ADJUDGED by the Court that Betty Sledge shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, the sum of $43,555.00 based upon the jury verdict and Plaintiffs' Motion for Judgment.

All of such amounts adjudged to Thomas Sledge and Betty Sledge shall bear interest from the date of this Judgment at the rate of 10% compounded annually.

It is ORDERED AND ADJUDGED by the Court that Bobbie Freeman shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally, these amounts (taken from Plaintiffs' Motion for Judgment and from the jury verdict, each of which is on file):

Actual damages with computed pre-judgment interest (Joint and Several Judgment against the above-named six defendants)	**$896,152.00**

It is also the JUDGMENT of the Court that Bobbie Freeman shall have and recover as punitive damages (based upon the jury's punitive damage findings) these amounts from the individual defendants, this award being a separate Judgment as to each of the named defendants:

The Celotex Corporation	**$250,000.00**
The Fibreboard Corporation	**$125,000.00**
Owens-Illinois, Inc.	**$250,000.00**
The Flintkote Company	**$125,000.00**
H. K. Porter Company, Inc.	**$125,000.00**
Garlock, Inc.	**$125,000.00**

It is ORDERED AND ADJUDGED by the Court that Donna Freeman shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and

Garlock, Inc., jointly and severally, the sum of $80,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment.

It is ORDERED AND ADJUDGED by the Court that Ollie Freeman shall have and recover from the Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc.. jointly and severally, the sum of $24,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment.

All of such amounts adjudged to Bobbie Freeman, Donna Freeman and Ollie Freeman shall bear interest from the date of this Judgment at the rate of 10% compounded annually.

It is ORDERED AND ADJUDGED by the Court that Lessie Williams shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, these amounts (taken from Plaintiffs' Motion for Judgment and from the jury verdict, each of which is on file):

Actual damages with computed pre-judgment interest (Joint and Several Judgment against the above-named five defendants)	**$419,130.00**

It is also the JUDGMENT of the Court that Lessie Williams shall have and recover as punitive damages (based upon the jury's punitive damage findings) these amounts from the individual defendants, this award being a separate Judgment as to each of the named defendants:

The Celotex Corporation	**$100,000.00**
The Fibreboard Corporation	**$100,000.00**
Owens-Illinois, Inc.	**$100,000.00**
The Flintkote Company	**$100,000.00**
H. K. Porter Company, Inc.	**$100,000.00**

It is ORDERED AND ADJUDGED by the Court that Carrol Purdy shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and she shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Cindy Powdrill shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and she shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Bobbie Phillips shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and she shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Patsy Fountain shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and she shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Ralph Williams shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and he shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Robert Williams shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc.,

jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and he shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Murry Williams shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and he shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**
The Flintkote Company	**$12,500.00**
H. K. Porter Company, Inc.	**$12,500.00**

It is ORDERED AND ADJUDGED by the Court that Emory Williams shall have and recover from The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, and H. K. Porter Company, Inc., jointly and severally, the sum of $72,000.00 based upon the jury verdict and Plaintiffs' Motion for Judgment and he shall have and recover (in accordance with the jury findings of punitive damages) these sums against the individual defendants:

The Celotex Corporation	**$12,500.00**
The Fibreboard Corporation	**$12,500.00**
Owens-Illinois, Inc.	**$12,500.00**

The Flintkote Company	$12,500.00
H. K. Porter Company, Inc.	$12,500.00

All of such amounts adjudged to Lessie Williams, Carrol Purdy, Cindy Powdrill, Bobbie Phillips, Patsy Fountain, Ralph Williams, Robert Williams, Murry Williams and Emory Williams shall bear interest from the date of this Judgment at the rate of 10% compounded annually.

In Cause No. 86-363, the Strong, Pool, Sledge and Freeman cases, the jury apportioned liability among the defendants in these percentages:

The Celotex Corporation	25%
The Fibreboard Corporation	15%
Owens-Illinois, Inc.	25%
The Flintkote Company	5%
H. K. Porter Company, Inc.	5%
Garlock, Inc.	5%

and it is the Judgment of the Court that each of those defendants have contribution and indemnity against each other defendant in accordance with the percentage findings.

In Cause No. 88-08-293, the Williams case, the jury apportioned liability among the defendants in these percentages:

The Celotex Corporation	15%
The Fibreboard Corporation	14%
Owens-Illinois, Inc.	15%
The Flintkote Company	14%
H. K. Porter Company, Inc.	14%

and it is the Judgment of the Court that each of those defendants have contribution and indemnity against each other defendant in accordance with the percentage findings.

It is ORDERED that all amounts adjudged in this case shall bear interest from the date of this Judgment at the rate of 10%.

It is ORDERED that all costs are taxed and assessed against the defendants, The Celotex Corporation, Fibreboard Corporation, Owens-Illinois, Inc., The Flintkote Company, H. K. Porter Company, Inc., and Garlock, Inc., jointly and severally.

It is finally ORDERED that execution shall issue on behalf of the plaintiffs, any defendants, and the officers of this Court for full and complete enforcement and collection of this Judgment and the costs.

Judgment entered November 1, 1989.

/s/ Donald R. Ross
Judge Presiding

[Filed Nov. 1, 1989]

APPENDIX E

[Excerpts from Owens-Illinois, Inc.'s Motion for New Trial]

IN THE DISTRICT COURT OF
RUSK COUNTY, TEXAS
4TH JUDICIAL DISTRICT

No. 86-363

REUBEN S. POOL, *et al.*

v.

FIBREBOARD CORPORATION, *et al.*

No. 88-08-293

LESSIE L. WILLIAMS, *et al.*

v.

FIBREBOARD CORPORATION, *et al.*

OWENS-ILLINOIS' MOTION FOR NEW TRIAL

[Filed Nov. 30, 1989]

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Owens-Illinois, Inc. ("Owens-Illinois"), one of the defendants herein, files this its Motion for New Trial, and for such would respectfully show unto the Court the following:

* * * *

VI.

Punitive Damages

Owens-Illinois has filed an Affidavit of Michael E. McConnell. In that affidavit, Owens-Illinois provides the Court with full caption information about seven asbestos lawsuits other than this one in which the punitive damage verdicts against Owens-Illinois total more than four million dollars. Pursuant to Texas Rule of Evidence 201, Owens-Illinois requests that the Court take judicial notice of the contents of Mr. McConnell's affidavit. Repeated imposition of punitive damages against Owens-Illinois for substantially the same conduct violates the due process, excessive fines, and other applicable provisions of the Federal and Texas Constitutions and is inappropriate under Texas common law. In light of the information contained in Mr. McConnell's affidavit, submission of the punitive damages issues and entry of judgment against Owens-Illinois for punitive damages in these cases were error, entitling Owens-Illinois to a new trial.

APPENDIX F

IN THE DISTRICT COURT
4TH JUDICIAL DISTRICT
RUSK COUNTY, TEXAS

No. 86-363

REUBEN S. POOL and LEE POOL, *et al.*

vs.

FIBREBOARD CORPORATION, *et al.*

No. 88-08-293

LESSIE L. WILLIAMS, RALPH E. WILLIAMS, ROBERT E. WILLIAMS, CARROL A. PURDY, MURRAY W. WILLIAMS, CINDY L. POWDRILL, BOBBIE S. PHILLIPS, EMORY G. L. WILLIAMS and PATSY R. FOUNTAIN

vs.

FIBREBOARD CORPORATION, *et al.*

AFFIDAVIT OF MICHAEL E. McCONNELL

[Filed Nov. 30, 1989]

STATE OF OHIO)
)
COUNTY OF LUCAS)

BEFORE ME, the undersigned authority, on this day personally appeared Mr. Michael E. McConnell, who, upon his oath, did state as follows:

1. My name is Michael E. McConnell. I am over the age of eighteen years, of sound mind, and competent in all respects to make this affidavit. I have personal knowledge of the facts set forth herein, and those facts are true and correct.

2. I am Assistant Secretary of Owens-Illinois, Inc. ("Owens").

3. As of the date of this affidavit, Owens is a named defendant in lawsuits involving in excess of 70,000 plaintiffs in which lawsuits the plaintiff claims to be entitled to recover damages as a result of injury caused by exposure to asbestos fibers or products containing asbestos fibers.

4. During 1988, Owens received lawsuits involving an average of about 1750 plaintiffs each calendar month. In 1989, Owens has continued to receive lawsuits at about the same rate.

5. The vast majority of the cases in which Owens is named as a defendant include claims or demands for both compensatory and punitive damages.

6. The amounts of damages sought in the complaints in the foregoing lawsuits, including both compensatory and punitive damage claims, against the Company and the other defendants exceed several billion dollars in the aggregate.

7. Owens has been subjected to punitive damage verdicts in the following cases in addition to this one: Louis L. Dickerson, Baltimore City Ct. 84331064/CLZ8011; William Zenobia, Baltimore City Ct. 86052050/CL46535; John E. Johnson, So. Dist. NY 87 CIV. 0724; Vincent Passantino, So. Dist. NY 87-CV-5019; Sutton Knuckles, Baltimore City Ct. 84325057/CL27828; Othello Armstrong, Baltimore City Ct. CT/88028502; and Forrest M. Wood, Baltimore City Ct. 87121049/CL65032. The punitive damage verdicts in these cases total more than four million dollars.

8. In each of the cases referenced in paragraph 7 above, the jury found substantially the same or similar conduct by Owens to be a basis for a punitive award. The punitive damage verdict in this case is based upon substantially the same or similar conduct by Owens that is the basis for the punitive damage verdicts in the cases referred to in paragraph 7 above.

9. Corporate records show that Owens sold its entire thermal insulation business effective April 30, 1958. Since April 30, 1958, Owens has not manufactured, sold, and/or distributed any asbestos-containing product.

10. Further review of company records demonstrates that the present corporate officers and directors of Owens did not hold such positions at the time Owens-Illinois Glass Company manufactured asbestos-containing products.

11. The corporate records further show that none of the present shareholders of Owens held any shares during the time in which Owens-Illinois Glass Company manufactured asbestos-containing products.

Further the affiant sayeth not.

/s/ Michael E. McConnell
MICHAEL E. MCCONNELL

SUBSCRIBED AND SWORN before me, the undersigned authority, on this the 8th day of November, 1989.

/s/ Shirley J. Sroczynski
SHIRLEY J. SROCZYNSKI
Notary Public
State of Ohio

My Commission Expires
Oct. 15, 1992

APPENDIX G

IN THE DISTRICT COURT
4TH JUDICIAL DISTRICT
RUSK COUNTY, TEXAS

No. 86-363

REUBEN S. POOL and LEE POOL, *et al.*

vs.

FIBREBOARD CORPORATION, *et al.*

No. 88-08-293

LESSIE L. WILLIAMS, RALPH E. WILLIAMS, ROBERT E. WILLIAMS, CARROL A. PURDY, MURRAY W. WILLIAMS, CINDY L. POWDRILL, BOBBIE S. PHILLIPS, EMORY G. L. WILLIAMS and PATSY R. FOUNTAIN

vs.

FIBREBOARD CORPORATION, *et al.*

ORDER OVERRULING MOTIONS FOR NEW TRIAL, MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTIONS TO DISREGARD JURY FINDINGS

[Filed Jan. 8, 1989]

On December 27, 1989, the Court heard the Motions for New Trial, Motions for Judgment Notwithstanding the Jury Verdict and Motions to Disregard Jury Findings filed by these defendants:

Owens-Illinois, Inc
H. K. Porter Company, Inc.
The Celotex Corporation

Fibreboard Corporation
Garlock, Inc.
The Flintkote Company

and any others.

After hearing the Motions and arguments of counsel, the Court finds that each Motion should be overruled.

It is accordingly ORDERED that the Motions of each defendant for New Trial, for Judgment Notwithstanding the Verdict and to Disregard Jury Findings is OVERRULED.

This Order is signed in duplicate originals and an original shall be filed in each case.

Dated January 8, 1990.

/s/ Donald R. Ross
Judge Presiding

APPENDIX H

[Excerpts from Owens-Illinois, Inc.'s Brief to Texas Court of Appeals]

IN THE COURT OF APPEALS FOR THE SIXTH JUDICIAL DISTRICT OF TEXAS AT TEXARKANA

No. 06-90-00014-CV
(Consolidated)

FIBREBOARD CORPORATION, *et al.*,
Appellants,
v.
REUBEN S. POOL, *et al.*,
Appellees.

No. 06-90-00022-CV
(Consolidated)

FIBREBOARD CORPORATION, *et al.*,
Appellants,
v.
LESSIE L. WILLIAMS, *et al.*,
Appellees.

BRIEF OF APPELLANT OWENS-ILLINOIS, INC.

BAKER & BOTTS
LARRY D. CARLSON
800 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2916

JOE R. GREENHILL
1600 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701

Attorneys for Appellant
Owens-Illinois, Inc.

* * * *

TWENTY-FIRST POINT OF ERROR

THE TRIAL COURT ERRED IN ALL FIVE OF THESE CASES IN RENDERING JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST OWENS-ILLINOIS, AND IN DENYING OWENS-ILLINOIS' MOTION FOR DIRECTED VERDICT ON THE PUNITIVE DAMAGES CLAIM, BECAUSE SUCH AN AWARD OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. (POOL TR., VOL. 37, AT 4608-18; S.F., VOL. IX, AT 1623-24)

TWENTY-SECOND POINT OF ERROR

THE TRIAL COURT ERRED IN ALL FIVE OF THESE CASES IN RENDERING JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST OWENS-ILLINOIS, AND IN DENYING OWENS-ILLINOIS' MOTION FOR DIRECTED VERDICT ON THE PUNITIVE DAMAGES CLAIM, BECAUSE SUCH AN AWARD OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF SECTION 19, ARTICLE I, OF THE TEXAS CONSTITUTION. (POOL TR., VOL. 37, AT 4608-18; S.F., VOL. IX, AT 1623-24)

TWENTY-THIRD POINT OF ERROR

THE TRIAL COURT ERRED IN ALL FIVE OF THESE CASES IN RENDERING JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST OWENS-ILLINOIS BECAUSE SUCH AN AWARD OF PUNITIVE DAMAGES IS INAPPROPRIATE UNDER TEXAS COMMON LAW. (POOL TR., VOL. 37, AT 4608-18)

When the reasons for the imposition of punitive damages no longer exist, their imposition should be re-

considered. This appears to be the case with punitive damages in asbestos litigation and the courts should so declare.[26]

Owens-Illinois is now litigating more than 70,000 asbestos claims. Affidavit of Michael E. McConnell ¶ 3 (Pool Tr., vol. 37, at 4669). Moreover, although Owens-Illinois left the asbestos-containing insulation business more than 30 years ago, during 1988 and 1989 it was sued by an average of 1,750 plaintiffs in asbestos cases *each month*. *Id.* ¶ 4. In the words of the Fifth Circuit: "The scope of this mass litigation is without precedent and practically without dimension. . . . [T]he prospects for future litigation are almost limitless." *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524-25 (5th Cir. 1984), *rehearing en banc*, 750 F.2d 1314 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

Most of the 1,750 plaintiffs who sue Owens-Illinois each month seek punitive as well as compensatory damages. Affidavit of Michael E. McConnell ¶ 5 (Pool Tr., vol. 37, at 4669). Before trial of this case, seven juries in asbestos cases had already assessed punitive damages against Owens-Illinois of more than $4,000,000. *Id.* ¶ 7. Following the appeal of this case to this Court, Owens-Illinois paid a judgment that included a $500,000 punitive damage award.[27] Given these facts, due process precludes

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[26] Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 301 (1983).

[27] On January 22, 1990, the Second Circuit affirmed the district court's judgment in Vincent Passentino v. Raymark Industries, Inc., No. 89-7855. A copy of the Second Circuit's unpublished two page opinion is attached to this Brief as Appendix C. Following the Second Circuit's affirmance, Owens-Illinois paid the full amount of this judgment, which included a $500,000 punitive damage award.

the imposition of additional punitive damages against Owens-Illinois in this case.[28]

Five of the nine U. S. Supreme Court Justices have indicated that substantive due process creates limitations upon punitive damage awards in civil litigation.[29] The

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[28] Owens-Illinois raised this constitutional objection to the imposition of punitive damages against it at every possible stage in this proceeding: its answers, motion for directed verdict, objections to the special issues and charge, and motion for new trial. (Pool Tr., vol. 1, at 9, 70, 84, 98, vol. 38, at 4674; S.F., vol. IX, at 1623-25, vol. XV, at 2861-63, 2865-66)

[29] In Banker's Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988), the majority declined to address a constitutional challenge to a punitive damage award because the issue was not properly raised in the lower court. Justice O'Connor, joined by Justice Scalia, authored a concurring opinion. O'Connor and Scalia agreed that *Crenshaw* was not the appropriate case to address constitutional limits upon punitive damage awards, but commented that "because of the punitive character of such awards, there is reason to think that [unlimited jury discretion] may violate the Due Process Clause." *Id.* at 1655.

In Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989), the majority rejected an excessive fines clause challenge to an award of punitive damages, but declined to consider the due process challenge because it was not raised in the lower court. Justice Brennan, joined by Justice Marshall, authored a concurring opinion. Brennan and Marshall concurred with the majority opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 2923. Brennan agreed, however, that the due process issue was not before the Court. Justice O'Connor, joined by Justice Stevens, also authored a concurring opinion in *Browning-Ferris*. Justice O'Connor reaffirmed her comments in *Crenshaw* and expressly agreed with Justice Brennan's conclusion "that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed . . . ." *Id.* at 2924.

The concurring opinions in the *Crenshaw* and *Browning-Ferris* cases, therefore, establish that Justices Brennan, Marshall, O'Connor, Stevens, and Scalia are willing to hold that the due process clause of the Fourteenth Amendment creates limits upon punitive damage awards in civil litigation.

basic requirement of substantive due process is "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981). In the unique situation of asbestos litigation, the repeated imposition of punitive damages against defendants for the same conduct or course of conduct is not fundamentally fair, it is fundamentally unfair.[30]

In *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989), an asbestos case, the Second Circuit held that Celotex had not preserved the due process issue because it had not provided the trial judge with the details of the prior punitive damage awards against it.[31] Significantly, however, the Second Circuit stated: "We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle." *Id.* at 398. Likewise, the Third Circuit has stated that "power-

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[30] The failure of the trial court in this case to give the jury any instruction or guidance with respect to the amount of punitive damages also offends due process. The American College of Trial Lawyers has suggested that juries be given an instruction requiring them to take into consideration six factors in determining the amount of punitive damages. American College of Trial Lawyers, *Report on Punitive Damages* 28 (1989). By contrast, the trial court here gave the jury no instruction or guidance whatsoever with respect to the amount of punitive damages. (Pool Tr., vol. 36, at 4435, vol. 37, at 4481, 4528, 4576; Williams Tr., vol. 20, at 2449). In *Crenshaw* and *Browning-Ferris*, several justices of the Court indicated that a trial judge's failure to instruct or guide the jury concerning the amount of punitive damages violates due process. *Crenshaw*, 108 S. Ct. at 1656 (O'Connor and Scalia, J.J.); *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan and Marshall, J.J.), 2924 (O'Connor and Stevens, J.J.). The Court has now granted certiorari in a case that squarely presents this issue. Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d. 537 (Ala. 1989), *cert. granted*, 58 U.S.L.W. 3628 (Apr. 2, 1990).

[31] By contrast, Owens-Illinois filed with the trial court the Affidavit of Michael M. McConnell (Pool Tr., vol. 37, at 4669), which sets forth all details concerning the prior punitive damage awards against it.

ful arguments have been made that, as a matter of constitutional law or substantive tort law, the courts should shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts." *In Re School Asbestos Litigation*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986).

A number of other judges and lower courts have opined that for due process or policy reasons a defendant ought not to be repeatedly assessed with punitive damages for the same conduct or course of conduct.[32] In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J.), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), the court concluded that, in asbestos litigation, substantive due process precludes a manufacturer from being "subjected to repeated punitive damage awards for the same conduct." 705 F. Supp. at 1065. In its second opinion, the *Juzwin* court concluded that it lacked the power to fashion

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[32] *E.g.*, In Re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process.") (Heaney, J., dissenting); Hanlon v. Johns-Manville Sales Corp., 599 F. Supp. 376, 379 (N.D. Ia. 1984) ("The Court must agree that the authorities cited raise serious questions concerning the constitutionality and the social desirability of imposing upon a single defendant liability for such a large number of punitive damages claims so as to threaten the defendant's corporate existence."); In Re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *modified*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."); In Re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.").

an effective remedy for this constitutional violation, but expressly adhered to its "previous ruling that repetitive awards of punitive damages for the same conduct violate a defendant's due process rights." 718 F. Supp. at 1234.

The repeated imposition of punitive damages against defendants in asbestos cases is inappropriate for other than constitutional reasons—repeated awards do not serve the punishment and deterrence purposes of punitive damages.[33] Owens-Illinois exited the asbestos-containing insulation business 32 years ago. Awards of punitive damages against it punish today's shareholders, management, and employees for the alleged sins of management in place 40 to 50 years ago. Moreover, Owens-Illinois has already been assessed punitive damages of more than $4 million and has paid one $500,000 award. Owens-Illinois has been punished enough. Indeed, having to defend 70,000 claims for compensatory damages alone would appear to be ample punishment for any mistakes made in connection with the manufacture and sale of a single product.[34]

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[33] The consequences of multiple punitive damages in asbestos litigation have been disastrous. Ten manufacturers of asbestos-containing products have already filed for (or been involuntarily placed in) bankruptcy, and an eleventh has dissolved. Hensler, *Asbestos in the Courts, The Challenge of Mass Toxic Torts* 22 (Rand Corp. 1985); 3 Mealey's Litigation Reports, Asbestos 3 (Sept. 23, 1988) (Raymark Industries, Inc.); 2 Mealey's Litigation Reports, Asbestos 938-45 (July 24, 1987) (Nicolet, Inc.); 1 Mealey's Litigation Reports, Asbestos 4863-64 (Aug. 22, 1986) (Standard Insulation, Inc.); Asbestos Litigation Reporter 12,805 (July 18, 1986) (Pacor, Inc.); North Am. Asbestos Corp. v. Superior Court, 179 Cal. Rptr. 889 (Cal. App. 1982) (dissolution of North American Asbestos Corporation).

[34] Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 295 (1983) ("It appears that, in asbestos litigation, the retributive and deterrent functions normally reserved to punitive damages are being substantially performed by the compensatory damages that defendants are being called upon to pay and will be called upon to pay, either directly or indirectly.").

For these constitutional and policy reasons, therefore, the trial court erred in rendering judgment imposing punitive damages against Owens-Illinois.

* * * *

APPENDIX I

[Excerpts from Owens-Illinois, Inc.'s Supplemental Brief to the Supreme Court of Texas]

No. D-1376

IN THE SUPREME COURT OF TEXAS

OWENS-ILLINOIS, INC., *et al.*,
Petitioners,

v.

REUBEN S. POOL, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OF
PETITIONER OWENS-ILLINOIS, INC.

BAKER & BOTTS, L.L.P.
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Attorneys for Petitioner
Owens-Illinois, Inc.

* * * *

IV. The Jury's Verdict Awarding Punitive Damages Was Not Limited To Any Specific Harm To These Plaintiffs

The constitutionally permissible purposes that justify the awarding of punitive damages—punishment for outrageous conduct and deterrence of future transgressions—focus upon the defendant's conduct, not the harm done to an individual plaintiff. Punitive damages awarded to a fully compensated plaintiff are not a right of that plaintiff, but are justified by public policy objectives. If those objectives have already been achieved in cases arising out of the same course of conduct, there is no remaining legitimate governmental objective that would allow funds of a defendant to be transferred to a plaintiff. As the United States Supreme Court has noted, "Punitive damages by definition are not intended to compensate the injured party, but rather to punish . . . and to deter . . . ." *City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981).

The constitutional flaw that afflicts repetitive punitive damages cannot be avoided by the erroneous suggestion that the awards of punitive damages in these cases do not reflect any overlapping assessments, but rather an award in each case merely for the harm done to a particular plaintiff. Plaintiffs have argued to this Court that the trial of this case was strictly confined to the facts relating specifically to them: "The jury awarded punitive damages for conduct related to *specific damages sustained by specific plaintiffs. The Petitioners did not offer any evidence of the national scope of the problem*, nor does state or federal law allow one jury to decide punishment 'for all of the injured plaintiffs in the nation.'" Plaintiffs' Opposition to Petition for a Writ of Error 25 (Nov. 8, 1991) (emphasis added).

To the contrary, at every step of the trial plaintiffs' counsel emphasized the number of plaintiffs in the na-

tional asbestos litigation and urged the jury to tie the amount of punitive damages to the death of thousands of men. From voir dire through closing, with both evidence and argument, plaintiffs' counsel stressed to the jury that the defendants at trial were responsible for injuring millions of American workers (not just the five plaintiffs) and for that reason should be punished severely.

For example, during voir dire plaintiffs' counsel advised the panel that "thousands and thousands and thousands of men" had been exposed to asbestos-containing products. (S.F., vol. 1, at 52.) Plaintiffs' "state of the art" expert witness, Dr. Joseph Wagoner, testified that during the next half century "tens of thousands of workers will die of cancer" caused by occupational exposure to asbestos-containing products. (S.F., vol. 3, at 143.) A medical expert called by plaintiffs testified that between 2,750,000 and 4,125,000 American workers will develop some type of asbestos-related disease. (S.F., vol. 4, at 617-18).

During closing, plaintiffs' counsel argued that the jury should award substantial punitive damages because the defendants were responsible for injuring thousands of workers. For example, plaintiffs' counsel accused the defendants of having "kill[ed] thousands of people." (S.F., vol. 16, at 2993). "Thousands of men have died from a disease that could have been prevented . . . if these companies would have done what they should have done." (S.F., vol. 16, at 2998-99). With the following argument to the jury, plaintiffs' counsel directly tied his appeal for punitive damages to the magnitude of harm allegedly caused by defendants to persons other than the plaintiffs in the case: "And these men died by the thousands, and there's going to be a bunch more of them. We're not through yet with the companies ignoring the danger and the risk. *That's why punitive damages.*" (S.F., vol. 16, at 2889) (emphasis added).

Moreover, it is wholly untenable to assume that $250,000 awarded to one individual is an appropriate *pro rata* share of a proper punitive total. It cannot possibly be the case that the $250,000 awarded to Mr. Pool as punitive damages is merely the small sliver that each claimant in this litigation may claim as his or her share of the total necessary to punish a single company and to deter others. If there were 100,000 claimants, and each was permitted by the courts to recover as punitive damages the amount awarded here to Mr. Pool, then the whole amount of punitive damages would be twenty-five *billion* dollars. This is inherently absurd, because no American business enterprise could pay this amount, or even half this amount. In short, repetitive awards of punitive damages arising from a single course of conduct cannot be justified on the ground that each award is tied to the injury to a specific, individual plaintiff.

It is essential, therefore, that prior awards of punitive damages against Owens-Illinois be considered when determining what would be a constitutionally permissible punitive award in the present case.

V. Multiple Punitive Awards Violate Due Process Under Haslip Where, As Here, There Exists No Rational Decisionmaking Process To Insure That The Total Amounts Awarded Do Not Exceed That Necessary for Punishment and Deterrence

Texas' system of awarding and reviewing punitive damages provides *no* mechanism for reviewing the aggregate amount of punitive damages awarded against a defendant for the same course of conduct. Because there is no rational decisionmaking process to ensure that these multiple punitive damages do not exceed that necessary to accomplish the constitutionally permissible goals, the Texas system (or, rather, lack of a system) is unconstitutional. As the federal Court of Appeals for the Fourth Circuit has noted, where "no criteria are provided against which to measure excessiveness" a punitive

damage award violates the Constitution: "[A]n award of punitive damages which is awarded without a legal standard is unacceptable, regardless of the amount." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 106 (4th Cir. 1991). (The Fourth Circuit, sitting *en banc*, recently relied on and approved the panel decision in *Mattison*. *Johnson v. Hugo's Skateway*, No. 90-2499, 1992 WL 213940 (4th Cir. Sept. 8, 1992).) Where no system is in place to assess the punitive and deterrent effect of previous awards of punitive damages for the same course of conduct, no rational standard is being applied and no rational assessment is being made.

Haslip held that punitive damages must be "rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. Most important, *Haslip* holds that punitive damage awards are constitutional only if awarded under a "rational decisionmaking process" that will "ensure" and "make certain" that the amount a defendant pays does not exceed that which a rational process finds to be necessary. Repetitive punitive damages in an uncoordinated nationwide process cannot pass muster under this constitutional standard. There is at present no rational decisionmaking process which can ensure that continuing and cumulative punitive awards based upon the same conduct are in fact necessary to punish and deter, because there is simply *no process* whatsoever, rational or otherwise, to assess and review the total amount that should be paid for this conduct.[8]

* * * *

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[8] The Alabama system of appellate review cited with approval in Haslip is more comprehensive than the current Texas scheme employed by the court of appeals below. The court below cited the factors from Alamo National Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981), as the constitutional test to determine if an award is excessive. *See* Fibreboard Corp. v. Pool, 813 S.W.2d 658, 686 (Tex. App. —— Texarkana 1991, writ granted). These factors include the following: "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer,

(4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety." Kraus, 616 S.W.2d at 910. Under Kraus, Texas fails to consider prior civil or punitive damage awards against the defendant for the same conduct. By failing to take even this minimal step toward rationally dealing with multiple punitive damages, present in the Alabama system sustained in Haslip, the Texas scheme is unconstitutional.

APPENDIX J

[Excerpts from Plaintiffs' Counsel's Voir Dire (Tr. 36, 52)]

* * * *

[36] VOIR DIRE EXAMINATION BY MR. HOUSTON

MR. HOUSTON: Ladies and gentlemen, as you obviously know, we're going to select 12 of you now to sit in the trial of these cases. When I speak of "these cases," here's what I'm talking about. There are five cases here that involve four injuries and one death—two deaths and three injuries from asbestos. You're going to hear all about asbestos during this week and probably part of next week from doctors who have studied these cases and in most instances have seen the Plaintiffs and will describe their conditions to you. * * *

* * * *

[52] I'm going to tell you up front that we contend that these companies knew, not only should have known, but actually knew that the products were dangerous. They knew it for years and years and they kept placing them on the market and never took any steps to protect anybody like these men, the thousands and thousands and thousands of men who worked with this stuff. They never took any steps at all to protect them until—they say that they never learned about the dangers to these working men until about 1965, when a doctor in New York by the name of Irving Selikoff published an article and said, "Look here, we've killed men, thousands of men, and we're going to kill thousands more from asbestos. It's dangerous." They continued on. They say that after that they began to put little warnings on their packages. These men never did see them, and I doubt seriously if any were placed on them. But in any event, these people didn't see them. And suddenly, by 1972, they all backed off and said get it out of the way, get it off the market. They got it off the market.

* * * *

APPENDIX K

[Excerpts from Testimony of Plaintiffs' Expert Witness, Dr. Joseph K. Wagoner (Tr. 127, 143)]

[127] DIRECT EXAMINATION

BY MR. HOUSTON:

Q Would you give us your name and place of residence, please, sir?

A Dr. Joseph K. Wagoner, Hudelston, Virginia.

* * * *

[143] Q Let me back up and interrupt you. This contains a headline up here that says, "Millions of American workers are handling asbestos on their job site, and medical experts estimate that because of this, tens of thousands of workers will die of cancer during the next half century." Do you agree with that statement?

A Yes. These are estimates that have been previously published in the World Health Monograph prepared by the International Agency for the Research on Cancer, where I was a member of the group preparing that.

* * * *

APPENDIX L

[Excerpts from Testimony of Plaintiffs' Expert Witness, Dr. Jeffrey D. Britton (Tr. 357, 614, 617-18)]

* * * *

[357]

J.D. BRITTON, M.D.

was called as a witness by the Plaintiff, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOUSTON:

Q Would you give us your full name, please, sir?
A Yes, sir. I'm Jeffery Donald Britton.

* * * *

[614]

REDIRECT EXAMINATION

BY MR. HOUSTON:

* * * *

[617] Q All right. Concerning the very article that Mr. McClure spent, I think probably an hour at least with you, yesterday and today, let's look and see if we can bring down some of the things that are important now from his very article. Concerning the opening sentence, "The health effects of asbestos have become a cause of serious concern in recent years. It has been estimated that from 1940 to 1979 in the United States alone, 27,500,000 individuals were exposed to the mineral at work." Do you find that there?

A Yes, sir.

Q If only 10 percent of those people get an asbestos disease and 10 percent would be a very low estimate

of people who would have a heavy exposure through the [618] years, wouldn't it?

A Yes, sir.

Q To get a disease from it?

A Ten percent would be low.

Q That'd be very low. But if only 10 percent got it, that's 2,750,000 people in the work span of these very men we're talking about?

A Yes, sir.

Q And if it was 15 percent, it would be 4,125,000 and from medical literature and your knowledge of the disease, each of those figures would be low—

A Yes, sir.

Q —for people who have had heavy exposure and have the disease. In other words, it'd be probably nearer half than it would the 10 or 15 percent, wouldn't it?

A Well, some people have died as a result of a war and died for other reasons, so 10 to 15 percent would be low figures.

Q Well, that would be a serious health problem if it was just 15 percent, wouldn't it?

A Yes, sir.

Q Four million one hundred and twenty-five thousand would be a serious, serious health problem?

A I would agree with that.

* * * *

APPENDIX M

[Excerpts from Closing Argument by Plaintiffs' Counsel (Tr. 2869, 2899)]

* * * *

[2869]

JURY ARGUMENT BY MR. HOUSTON

* * * *

MR. HOUSTON: * * * [2899] And these men died by the thousands, and there's going to be a bunch more of them. We're not through yet with the companies ignoring the danger and the risk. That's why punitive damages. * * *

* * * *

APPENDIX N

[Excerpts from Closing Argument by Plaintiffs' Counsel (Tr. 2992-93, 2998-99)]

* * * *

[2992]

JURY ARGUMENT BY MR. SADLER:

* * * *

MR. SADLER: * * * [2993] In contrast, all these people did was manufacture a product that they knew contained a toxic and poisonous substance, put it in the marketplace and sent it all over this country, hide the dangers, never tell anyone, let it be put in our buildings, in our schools, and kill thousands of people. * * *

* * * *

[2998] * * * Thousands of men have died from a disease that could have been prevented if [2999] someone would have cared, if these companies would have done what they should have done. * * *

* * * *

No. 92-1241

In The Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

REUBEN S. POOL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

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April 8, 1993

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

Continental Casualty Company, pursuant to Rules 21.2(b) and 37.2 of the Rules of this Court, requests leave to file the accompanying brief as *amicus curiae* in support of petitioner on the question whether multiple awards of punitive damages against a party for a single course of conduct that ended many years ago violates that party's procedural and substantive due process rights. Continental Casualty is filing with this motion a letter of consent from petitioner's counsel to file this brief. Counsel for respondents has refused to so consent.

Continental Casualty Company, a Chicago-based insurance company, is interested in the subject matter of this petition because of the tremendous adverse effect that pending and future punitive damage awards could have on the company as a result of litigation

nationwide against Continental's insureds. Continental is particularly concerned with litigation involving its insureds who manufactured asbestos products. Because punitive damages are, in some instances, passed on to insurers, Continental could ultimately be held liable for hundreds of millions of dollars of punitive damage awards in asbestos cases.

The problems caused by multiple awards of punitive damages against the same defendant are nowhere more acute than in the context of asbestos-related bodily injury and property damage claims. As this Court well knows, the number of such claims in both the federal and state courts is enormous and still rapidly growing. A recent study, discussed in the accompanying brief, estimates that between 1990 and 2049 there will be more than 560,000 asbestos-related claims. As a result of such claims, at least 15 asbestos manufacturers have already declared bankruptcy.

History shows that punitive damages awarded in asbestos cases can be enormous. As is discussed in the accompanying brief, in one class action alone, involving more than 2300 claims in the Eastern District of Texas, the court allowed punitive damages in an amount that on average exceeded $500,000. Mounting punitive damages claims in this context merely mean that many future asbestos claimants with actual injuries will go uncompensated for lack of funds. Moreover, current repetitive punitive damage awards, directed at behavior that ended 20 to 30 years ago, for the most part "punish" only individuals who had nothing to do with the alleged wrongdoing.

Continental's concern with this issue is evidenced by its potential massive liability for these unjust and unconstitutional punitive damage awards. Moreover, Continental offers the Court its perspective on this issue as an entity whose liability for such awards can serve no purpose other than to line the pockets of already compensated claimants and their attorneys. All that is deterred when a liability insurer must pay punitive damages of this sort is the insurer's willingness to underwrite such risks in the future. The only persons punished are the insurers and their policyholders, who must pay higher premiums in the future to help cover the windfalls bestowed upon those lucky enough to have been unjustly indulged by this nation's courts.

Continental submits this brief because Continental believes it will help the Court understand why it is time for the Court finally to address the constitutionality of multiple awards of punitive damages. This is the only Court that clearly has the power to do something about this problem of national scope; and if this Court does not act soon, Continental fears that no other court can or will grant effective relief.

CONCLUSION

Continental respectfully requests that the Court permit it to file the attached *amicus curiae* brief.

Respectfully submitted,

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Continental Casualty Company submits this brief as *amicus curiae* in support of petitioner on the question whether multiple awards of punitive damages against a party for a single course of conduct that ended many years ago violates that party's procedural and substantive due process rights.

INTEREST OF *AMICUS CURIAE*

Continental's interest is addressed in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

This nation's courts, both federal and state, are now being overwhelmed by mass tort lawsuits seeking to hold defendants liable

over and over again for punitive damages based on precisely the same alleged conduct in each case. And most of those courts have felt obligated to permit such awards. Increasingly, however, courts and individual jurists are lamenting their real or perceived inability to disallow punitive damage awards in mass tort cases because they believe them to be both unconstitutional and unjust. Most commentators addressing the issue have agreed.

Multiple awards of punitive damages in mass tort cases result in a defendant being punished over and over again for the same conduct. The result has aptly been described by jurists and commentators alike as "overkill." Not surprisingly, such overkill has rendered some defendants insolvent and threatens numerous others with that fate, even though presumably no individual jury or court intended such a result. Perhaps more importantly, payment of punitive damage awards to plaintiffs who happen to sue earlier can prevent later payments of compensatory awards.

The capricious effects of this phenomenon are nowhere more apparent than in the nationwide mass tort litigation involving asbestos. With well over 100,000 claims already filed, and as many more such claims expected before the year 2050, the effects of the liability from compensatory damages alone has been formidable. When repeated awards of punitive damages, as much as several hundred million dollars in a single class action, are heaped on top of the compensatory awards, it is not surprising that more than a dozen asbestos manufacturers already have been driven into bankruptcy. Those that remain cannot possibly pay all valid compensatory claims as well as the huge multiple awards of punitive damages. As a result, many valid compensatory claims will go unpaid, while other claimants will walk away with massive windfalls from punitive awards. Moreover, the punitive and deterrent purpose of such awards is difficult to see when the manufacture of asbestos ceased long ago, and the only persons in fact punished are current employees and owners, as well as trade creditors, customers and insurers, who had nothing to do with the wrongful acts complained of.

Lower courts, although recognizing the due process concerns here, have felt themselves powerless to resolve them because they face litigation that is nationwide, with no single source of oversight, other than this Court. Any due process limitations imposed upon

punitive damages by one jurisdiction can be, and are, ignored in others. The problem has reached an acute state in the asbestos context. Only this Court can now meaningfully impose the necessary constitutional limitations on the lower courts. The Court therefore should grant the petition to review this vitally important issue.[1]

REASONS FOR GRANTING THE WRIT

MULTIPLE AWARDS OF PUNITIVE DAMAGES IN THE MASS TORT CONTEXT ARE NOW A SERIOUS NATIONAL PROBLEM REQUIRING THE ATTENTION OF THIS COURT

The potential constitutional problems inherent in awarding punitive damages, recognized by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), are magnified tremendously when the same defendant is independently assessed punitive damage awards in multiple proceedings for the very same conduct. This now commonly occurs in so-called "mass tort" litigation, where the same conduct results in injury to numerous individuals, who then sue the defendant, and recover awards, in separate fora. The results can be, and have been, devastating to defendants who are assessed punitive damages awards by each of these various courts intended to punish the same conduct. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140 (1986) ("Repetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair.").

Mass-tort litigation already is overwhelming some of the nation's courts. "The litany of well-known 'litigation events' arising out of common disasters, product uses, or environmental condi-

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[1] Continental is aware that two other parties in this case have filed petitions for writs of certiorari with this Court asking for review of this issue. *See Celotex Corp. v. Pool*, No. 92-1471; *Fibreboard Corp. v. Pool*, No. 92-1474. Continental believes that the Court should grant those petitions as well and consolidate them with the Owens-Illinois matter.

tions — such as asbestos, Agent Orange, DES, Dalkon Shield, or skywalk collapses — attest to this phenomenon." Edward F. Sherman, *Symposium on Problems in Disposition of Mass Related Cases and Proposals for Change*, 10 Rev. of Litig. 209, 209 (1991). Moreover, all indications are that mass tort litigation, although of relatively recent origin, is here to stay. *Id.*[2] Hence, the problem of multiple awards of punitive damages in the mass tort context is also here to stay, and merits review by this Court.

A. Punitive Damages in the Mass Tort Context Result in "Overkill," in Violation of the Due Process Rights of Defendants

The "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" was first identified by the federal courts 25 years ago. *See* Jeffries, *supra*, at 141. In 1967, in the case of *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967), the Second Circuit faced one of many requests nationwide for punitive damages in cases involving MER/29, a drug designed to lower blood cholesterol but which, as a side effect, caused cataracts. Although ultimately finding no grounds for punitive damages, Judge Friendly, writing for the court, grappled with due process concerns with awarding such damages in more than one case against the same defendant:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive

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[2] "Mass tort litigation will continue to preoccupy our legal system. Future technological development will produce not only new, unforeseen risks to public health and safety, but will also increase our ability to identify these dangers after they have caused injuries. Moreover, the experience of lawyers and judges in handling such cases increases the feasibility of future similar litigation and encourages successful plaintiffs' lawyers to identify and pursue claims arising from new areas of mass tortious behavior." Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 Law & Contem. Probs. 227, 227-28 (1991).

> damages in the amount here awarded, these would run in to tens of millions, as contrasted with the maximum criminal penalty of "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine." ... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Id. at 839.

Although a number of courts and commentators have struggled with this problem since, *see infra*, at pages 7-9, the concerns, and current helplessness, of lower courts facing this issue are best illustrated by *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) (*Juzwin I*), and by the court's subsequent opinion vacating its earlier order, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*). In *Juzwin I*, a consolidated asbestos-related product liability action, the court, noting the serious problems inherent in the imposition of punitive damages in mass tort litigation, concluded that awarding punitive damages more than once in such a context violated the defendants' due process rights. 705 F. Supp. at 1064.

The imposition of punitive damages in the mass tort context, noted the court, magnifies to an extreme degree all of the normal problems inherent in the usual punitive damages case. *Id.* at 1055. These include (1) vague jury standards and excessive jury discretion, (2) imposition of a penalty in a civil matter that may far exceed any penalty provided under criminal statutes, with none of the same safeguards, (3) the possibility of insolvency as a result of such awards, and (4) payment of such penalties to a fortuitous plaintiff rather than to a public treasury. *Id.* As Judge Sarokin explained:

> All of the foregoing defects are exacerbated in mass tort litigation. Defendants can be held liable over and over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be. Nor is the cumulative effect of such awards reviewable

> by a single court, since the matters are permitted to proceed and be reviewed separately and independently.

Id.

Such multiple punitive damage awards result in, and continue to threaten, injustice, in many cases on a massive scale. Probably the most commonly recognized problem is that the payment of punitive damages to those who happened to sue earlier can diminish the ability of the defendant even to pay compensatory damages to later deserving claimants. As Judge Sarokin explained, "If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated." *Id.* *See* William W. Schwarzer, *Punishment Ad Absurdum*, Cal. Lawyer 116 (Oct. 1991) ("In mass tort cases such as those involving asbestos, the available assets of the defendants may be depleted long before all plaintiffs are compensated. To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair.").

In addition, multiple awards of punitive damages can have the punitive effect of driving businesses into bankruptcy — the corporate equivalent of a death sentence — even though no court or jury intended or desired that result. John A. Maya, *Punitive Damages and the Mass Tort: An Insurance Alternative to the Consequences of Multiple Liability*, 42 Syracuse L. Rev. 1241, 1253 (1991) ("Punishment, and not annihilation, is the object [of punitive damages].") (quoting *Pease v. Beech Aircraft Corp.*, 113 Cal. Rptr. 416 (Ct. App. 1974) (order granting new trial, Civ. No. 162581 (1971)); *Juzwin I*, 705 F. Supp. at 1055 ("the ability to financially destroy an individual, a business, or an entire industry ... is an awesome power to place in the hands of a jury without limitations or guidelines"). Moreover, the deterrent purpose of punitive damages is lost where the conduct complained of occurred decades earlier and results merely in the punishment of owners or corporate officials who did not participate in that conduct. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 12 Cardozo L. Rev. 1819, 1864 (1992). And if successive fines render a company insolvent, the imposition of punitive damages punishes innocent employees and trade creditors,

as well as, in some cases, their insurers, rather than the persons who committed the misconduct.

In light of these intractable problems, Judge Sarokin issued an order stating that the court would dismiss plaintiffs' claims for punitive damages against those defendants "who are able to present competent proof that liability for punitive damages has already been imposed upon them for the conduct alleged to be the basis of a punitive damage claim in this action." *Id.* at 1065.

Numerous jurists have agreed with Judge Sarokin's reasoning in finding that punitive damages awarded in the mass tort context threaten the defendants' due process rights under the Fourteenth Amendment. *See, e.g., Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.) (finding strong arguments why "the courts [should] shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), *cert. denied*, 479 U.S. 852 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re Agent Orange Product Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("In theory, ... when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit either as a matter of policy or as a matter of due process to the amount of times defendants may be punished for a single transaction."); *In re Northern Dist. Cal. Dalkon Shield IUD Products Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *But see Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) (finding no *procedural* due process problem because "the

presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all of the procedural safeguards to which it is due"), *cert. denied*, 478 U.S. 1021 (1986); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 281-87 (D.N.J. 1989) (finding merit in "overkill" argument but no evidence that defendants in case faced bankruptcy); *see also Dunn v. Hovic*, 1992 WL 228875 (3d Cir. 1992) (Weis, J., dissenting) ("Under current conditions, it is fanciful to believe that punishment and deterrence are factors worthy of consideration in assessing priorities to limited funds. Here, punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their costs to society."), *rehearing granted and opinion vacated* (October 8, 1992).

Similarly, commentators almost uniformly have agreed that multiple awards of punitive damages for the same conduct threaten serious injustice. *See, e.g.*, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154 (1986) ("Limiting aggregate punitive awards is a straightforward application of an ancient and settled principle of Anglo-American justice. That principle condemns excessive monetary penalties, whether civil or criminal. More specifically, it requires, at a minimum, that monetary penalties be limited in amount so as not to threaten the defendant's economic viability.");[3] Dennis Neil Jones, *et al.*, *Multiple Punitive Damages Awards for a Single Course of*

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[3] Part of the rationale in *Haslip* for affording the jury considerable discretion in awarding punitive damages there does not apply when mass tort litigation is involved. In *Haslip* the Court stated: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." 111 S. Ct. at 1043 (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)); *see also* 111 S. Ct. at 1046 (Scalia, J., concurring in the judgment). Although, as Professor Jeffries explains, the argument for *containing* excessive punitive damage awards has been around for a long time, he points out that awards of punitive damages in mass tort cases are very new, and hence do not deserve the presumption of validity associated with longevity. Jeffries, *supra* at 140 ("the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience.").

Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 3 (1991) ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause. The aggregate effect of such awards may reach far beyond their purpose to punish and deter, becoming what has been coined 'overkill.'"); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983) ("The recent unprecedented number of multiple punitive damages verdicts in mass tort cases has raised again the specter of overkill recognized by Judge Friendly in *Roginsky*.") Note, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L.J. 1273 (1982); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797 (1979).

B. The Asbestos Cases Best Illustrate the Current and Potential Future Dimensions of the Problem

Nowhere are the problems caused by multiple awards of punitive damages more acute now than in the lawsuits, such as this case and the *Juzwin* case itself, arising out of asbestos-related bodily injury and property damage. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335 (5th Cir. 1985) (Clark, C.J., dissenting) ("No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure.").[4] Cases grappling with claims for asbestos-

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[4] "No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an 'impending disaster' — a crisis situation. Even though 100,000 claims have already been resolved, 100,000 new claimants now seek compensation. For each claim resolved, two to three new claims are being filed. More than a dozen major defendant companies have been driven into bankruptcy, thereby reducing the size of the asset pool available to

(continued...)

related bodily injury and property damage showcase and highlight the fundamental problems that arise when courts and juries are permitted repeatedly to heap punitive damage awards on top of already large compensatory damage awards.

As the Court is well aware, the number of asbestos claims is huge and ever growing. *See Judicial Conference Ad Hoc Comm. on Asbestos Litig., Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* (March 1991), reprinted in Asbestos Litig. Rep. 22,698 (March 14, 1991). According to one scholar, "[o]ver 150,000 asbestos-related claims were filed by 1991, and it is estimated that 2,000 new cases are filed each month." Joseph M. Pastore III, *The Uncertain Future of the Class Action Suit in School Asbestos Litigation*, 8 Pace Env. L. Rev. 667, 667 (1991). In a recent report by Eric Stallard and Kenneth Manton for the Duke University Center for Demographic Studies entitled *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants, 1990-2049* 42 (Draft November 30, 1992), the authors estimate that between 1990 and 2049 there will be 560,301 asbestos-related claims. These numbers already overwhelm the nation's state and federal courts and will continue to do so well into the 21st Century. *See* Linda S. Mullenix, *Problems in Complex Litigation*, 10 Rev. of Litig. 213, 214 (1991) ("Asbestos litigation has become the federal court system's Sisyphean task: no matter how efficiently the courts push asbestos lawsuits through the system, more cases are filed in the courts without signs of respite."); *accord* Brickman, *supra*, *passim* (describing how every attempt by courts to reduce the asbestos backlog has in fact made it easier for plaintiffs' attorneys to file even more asbestos claims).

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[4](...continued)
compensate the severely injured. The seeming unending growth in the number and valuations of claims that courts and juries are producing will inexorably lead to additional defendants' bankruptcies. Those who peer into the future see an estimated cost to defendants ranging from thirteen to thirty billion dollars — valuations wholly inconsistent with the continued solvency of most currently named defendants." Brickman, *supra*, at 1819-20.

The wrongful conduct at issue in punitive damages claims against asbestos manufacturers occurred roughly between 1930 and 1960, when it is alleged that *some* asbestos manufacturers tried to suppress the dangerous character of asbestos fibers. *See* Paul Brodeur, *Outrageous Misconduct, The Asbestos Industry on Trial* (1985). Indeed, asbestos was taken off the market in 1971. *Id.* The punitive damage awards, however, are being, and apparently will continue to be, assessed from now on through the year 2049. Stallard & Manton, *supra*, at 42. This means that corporate defendants already are being "punished" — again and again — for conduct that occurred 30 to 60 years ago. Before the claims terminate, punitive damage awards will be meted out for conduct that is over a *century* old, when no one will be alive who had anything to do with the relevant decisions.

The combination of compensatory and punitive damages already has led to bankruptcy proceedings for at least 15 asbestos manufacturers. Brickman, *supra*, at 1819 & n.2. The increasing imposition of punitive damages thus hurts two classes of innocent parties. First, they wipe out funds that otherwise would be available to pay compensatory damages to deserving plaintiffs in the future. Brickman, *supra*, at 1867; *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, C.J., dissenting). Second, punitive damages punish current corporate owners and officials, as well as employees, customers, trade creditors, and sometimes insurers, who took no part in, and had absolutely no knowledge of, the wrongdoing.

History shows that the punitive damages awarded in a single case can be enormous. Already hundreds of millions of dollars have been awarded in punitive damages against asbestos defendants. Brickman, *supra*, at 1867-68 & n.198. In one case alone, *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990), for instance, where the court consolidated 2300 claims for one "trial" in the Eastern District of Texas, the court imposed punitive damages across the board using a multiplier for each defendant that levied punitive damages by an amount that was 1.5 to 3 times the compensatory damages for each defendant. The average compensatory award to individual plaintiffs in that case exceeded $500,000. As a result, the resulting punitive damages award alone was several hundred million dollars.

C. Lower Courts Are Powerless To Solve the Problem, Requiring Intervention By This Court

Six months after publishing his opinion in *Juzwin I*, Judge Sarokin, on a motion for reconsideration, issued a second opinion (*Juzwin II*) vacating the first. 718 F. Supp. 1233. In that opinion he refused to back down from his conclusion that multiple awards of punitive damages in the mass tort context were an unconstitutional violation of due process. *Id.* at 1236. He concluded, however, that "[u]ntil there is uniformity either *through Supreme Court decision* or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated." *Id.* at 1235 (emphasis added).

In the end, the court vacated its previous order because, although it had identified a clear constitutional wrong, it felt itself powerless to provide a meaningful remedy. The court's jurisdiction was limited by the borders of New Jersey, and it had no way to ensure that the parties' due process rights were protected in every court they entered. Hence, Judge Sarokin could not be sure what amount of punitive damages, if any, was appropriate in his court. *Id.*

As Judge Sarokin recognized (and evidenced), in the absence of guidance from this Court, it will not do simply to rely upon trial judges, or even appellate judges, to monitor punitive damages awarded in mass tort cases in their jurisdictions. As the *Juzwin* court pointed out, "the parochial concerns of the courts of the various states and the vague guidelines for justifying a judicial determination of 'excessiveness' of awards ... render this remedy an ineffectual alternative." *Id.* at 1056 n.1. Professor Jeffries has elaborated on this problem:

> The court that denies an additional award on the ground that the defendant has been sufficiently punished by previous judgments has no guarantee that other courts will follow suit.... [T]he most that an individual state can do is to adopt a self-denying ordinance that would succeed only in disadvantaging its own citizens relative to claimants in less responsible jurisdictions. The likelihood would be

> just the opposite — that a kind of competition will develop to show that Texas plaintiffs (and their lawyers) are just as entitled to riches as their California counterparts.

Jeffries, *supra*, at 146; *accord* Brickman, *supra*, at 1827 ("In the highly mobile asbestos-claims market, the efforts of one jurist to undo the perverse incentive structure is easily countered by other jurists not similarly inclined.").[5]

In short, only this Court effectively can address the problem of the constitutionality of multiple awards of punitive damages in the mass tort context, for this is the only court in a position to decree what is constitutionally appropriate for every federal and state jurisdiction in the United States. In other words, this is the only court that can grant effective relief here.

D. This Issue Merits Review Independently From *TXO*

This Court has granted review in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 594 (1992), where it presumably will review appropriate due process standards for punitive damage awards generally. Such review is important and could and should have important consequences for the issue addressed here.[6] Nevertheless, *TXO* did not involve a mass tort, and, as explained above, punitive damages in the mass tort context

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[5] Judge Weis, dissenting in *Dunn v. Hovic*, 1992 WL 228875 (3d Cir. 1992), recognized this tendency to parochialism as well when he lamented: "Society's interest in protecting future claimants demands that present plaintiffs — both those who go to trial and those who settle — forego the 'bonus' offered by punitive damages or a high settlement achieved by their threat. Courts should recognize that the public interest outweighs the parochial concerns in having citizens within its jurisdiction 'get theirs now.'"

[6] Indeed, Continental Casualty submitted an *amicus curiae* brief in *TXO* urging the Court to keep the issues addressed in this brief in mind when formulating the principles of law necessary to resolve that case.

raise unique issues not encountered in the ordinary punitive damages case. Because, for the reasons explained above, these issues merit the attention of this Court regardless of the outcome in *TXO*, this case merits independent review.

CONCLUSION

Owens-Illinois' petition for a writ of certiorari should be granted.

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appellate review it must be admitted that the amount of the award of this jury as it relates to these specific plaintiffs was reasonable and is not excessive.

The Petitioners, Celotex, Owens-Illinois and Fibreboard, contend that the potential for multiple awards of punitive damages against them violates due process. The Petitioner, Flintkote, contends that the procedural rules and guidelines contained in Texas common law violate due process. Additionally, Petitioners, Flintkote and Fibreboard, complain that the award of punitive damages was improper because of evidentiary concerns or that the Court of Appeals did not fully review the evidence with respect to the Supreme Court guidelines for review of the amount of damages awarded.

A. *The Supreme Court Does Not Have Jurisdiction of the Punitive Damage Complaint.*

This Court, in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), clearly reaffirmed the long standing rule of appellate review of excessiveness of a punitive damage award. The Court stated:

> Whether the amount of damages awarded by the jury is excessive is a question of fact over which this Court has *no jurisdiction*.
>
> Whether the Court of Civil Appeals applied *an erroneous standard in determining the excessiveness of damages* presents a question of law within the jurisdiction of this Court.

Respondents would respectfully contend that absent a complaint in the Court of Appeals that the award of punitive damages was excessive, then any complaint related to the award which concerns the amount of damages awarded or the application or sufficiency of the guidelines for reviewing the award of punitive damages has been waived and this Court does not have jurisdiction to now consider either the award or the sufficiency of the guidelines to review an admitted reasonable award of punitive damages.

Clearly, a review of the Points of error raised before the Court of Appeals and assigned in the respective Motions for Rehearing, demonstrates that the Petitioners did not challenge and do not challenge the amount of the punitive damage award. Likewise, the Petitioner did not seek a remittitur of punitive damages. The Petitioners do not and did not challenge the right of the plaintiffs to recover punitive damages in a failure to warn action with a finding of gross negligence. Petitioners, Celotex and Owens-Illinois, do not now challenge the evidence or basis of the award of punitive damages. It is axiomatic that the Petitioners should not be allowed to challenge the sufficiency of the guidelines of review or the application of those guidelines if they fail to allege, complain or even attempt to demonstrate that the underlying award is, in fact, excessive.

The Petitioners cite as authority, the recent United States Supreme Court Opinion of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). Clearly, *Haslip* involved a due process challenge to a judgment awarding punitive damages following a complaint that the award was excessive. It was in context of that challenge that a review of the Alabama standards was made. Absent a challenge of the underlying award, there would have been no cause to review the Alabama procedures as they relate to a due process challenge. Therefore, this Court should deny the

Applications for Writ of Error as to these Points of Error because the Court lacks jurisdiction or because of waiver for failure to challenge the underlying award as excessive.

Since the amount or propriety of the award has not been challenged, the only constitutional questions presented are whether the potential for multiple awards violates due process or whether or not the Texas common law method of assessing punitive damages is per se unconstitutional and violates due process. Both of these issues have been previously reviewed and discarded by the United States Supreme Court and the Fifth Circuit Court of Appeals.

In fact, all of the constitutional arguments presented by these defendants have been previously decided adverse to their position by Federal Court of Appeals, Fifth Circuit and Petition for Writ of Certiorari denied by the United States Supreme Court. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506; *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. en banc 1985);781 F.2d 394 (5th Cir. 1986); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1985); *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256 (5th Cir. 1990); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991); *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), (see attached copy as Appendix 1).

B. *The Potential of Multiple Punitive Awards or the Existence of Multiple Punitive Awards Does Not Violate Due Process.*

The Petitioners assert that this precise constitutional argument has not been previously reviewed or considered. In fact, it has been considered many times by the Fifth Circuit Court of Appeals and has recently been specifically

refused by the United States Supreme Court by denying certiorari in *King*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991). (See Appendix 2 for a copy of the applicable portion of the Petition for Writ of Certiorari by Celotex in *King*, *Id.*) Additionally, it was specifically addressed, again, by the Fifth Circuit in *Glasscock*, *Id.* Opinion at 23.

The asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869. The full extent for the death and disease caused by the manufacturers of products containing asbestos such as these Petitioners was not known at that time by the plaintiff and has still not been fully realized. Only the Petitioners knew the extent of the exposure throughout this country and the thousands they voluntarily and knowingly exposed to asbestos.

The punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual form minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts," which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex, Owens-Illinois and Fibreboard urge that it is not this particular award that is objectionable but, rather, the combination of past awards the potential of future awards that violates due process. Thus, it argues, having one

punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after the defendant selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, the Petitioners would object that it violated the very Texas standards it complains of in this Application.

Interestingly, under this appellate record with the absence of a challenge that the award of this jury is excessive, Petitioners would have this Court overturn an award that has been admitted to be reasonable and based upon specific individual harm because another plaintiff in a different lawsuit with different injuries and damages was awarded punitive damages for his individual harm. Clearly, there is no principle of law that justifies that conclusion or action by this Court.

Not only does the Petitioners view of due process violate both due process and equal protection principles, it would completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, the defendant could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and

the extent to which the defendant's conduct offends the public sense of justice and propriety. Petitioners argue that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essence, their argument is that they injured and caused death in so many people that they should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease in 65,000 people. The conduct of the Petitioners consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff.

The simple fact is that the Petitioners could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of the jury was unjust because of prior awards.

By affidavit, post-trial, the Petitioners, Celotex and Owens-Illinois, demonstrated only that two prior punitive

damage awards had been paid. (Respondents have no way of determining the truth of the assertion.) This type of evidence has been rejected by the Second Circuit as failing to make an adequate record in the Trial Court to support a due process challenge. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 297, 112 L.Ed.2d 250; *Racich v. Celotex Corp.*, 887 F.2d 393 (2nd Cir. 1989).

In *Johnson v. The Celotex Corporation*, 111 S.Ct. 297, Celotex and Owens-Illinois, appealed an adverse judgment presenting this precise argument. Celotex offered no evidence of the amount of punitive damages paid. However, Owens-Illinois advised the Court it had paid $554,194 in punitive damages. The Second Circuit wrote, "there has been insufficient proof to demonstrate and *unjust result* of multiple imposition of punitive damages for the same course of conduct." *Id.*, at 1287. The Court continues, stating, "The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process." *Id.*,at 1287, 1288. Such is the scenario now before this Court. The Petitioners have simply failed to maintain and present an adequate record that will support its due process arguments. Furthermore, the Petitioner, Fibreboard, has not demonstrated any award of punitive damages that it has paid.

This jury awarded punitive damages for conduct related to specific damages sustained by specific plaintiffs. The Petitioners did not offer any evidence of the national scope of the problem, nor does state or federal law allow one jury to decide punishment for "all of the injured plaintiffs in the nation." The safeguard in the common law system of assessing punitive damages is that a plaintiff must prove and

recover a specific amount of actual damages for *his* injuries and the punitive damages *must* be "reasonably proportionate" to those damages.

Finally, the Petitioners urge that, for some of them, the conduct complained of stopped years ago and, therefore, the deterrence purpose of punitive damages has been served. Such an argument suggests that a company can engage in grossly negligent conduct killing thousands of people, but avoid punishment simply by stopping the conduct or by killing too many people. This very shallow argument has far reaching consequences for Texas law. For example, a company that hires a driver with a known record of drunkenness causing accidents, could avoid punishment and, thus, deterrence, by firing the driver before punitive damages are rendered and claim no deterrence was necessary. The policy of deterrence underlying punitive damages or punishment is not solely for the individual or entity engaging in the conduct but, rather, to prevent others from engaging in the same or similar conduct. For purely policy reasons concerning the safety of the public, a company that engages in conduct causing death and disease in 70,000 people should not be able to claim avoidance of punishment and deterrence because one plaintiff received punitive damages for *his injuries*. The argument of the defendants makes a mockery of deterrence, fairness and justice for innocent and unknowing workers. For these reasons, Texas law has always recognized the right of an individual to seek punitive damages when the conduct of the defendant is grossly negligent. Texas law provides fundamental fairness in the adjudication of a claim for punitive damages and safeguards concerning the amount of damages awarded.

The Fifth Circuit recently denied these very same argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), stating:

Each of these plaintiffs also has a right to seek punitive damages for Celotex's willful and intentional failure to warn about the dangers of asbestos. *There is no principle in law limiting the recovery of punitive damages to the first claimant.* (*Glasscock*, at page 24.)

Clearly, no violation of the Constitutions of the United States or Texas has been demonstrated. This very argument has repeatedly been urged and denied in Federal Court and certiorari denied by the United States Supreme Court. Consequently, this Point of Error should be denied.

C. *Texas Law Provides Sufficient Due Process Safeguards for the Imposition of a Punitive Damage Award.*

Respondents would, again, respectfully urge that the failure of the Petitioners to challenge the award of punitive damages as excessive precludes consideration of this Court of a challenge to the sufficiency of those guidelines or their application to this award. Nevertheless, Respondents will demonstrate that Texas law has sufficient safeguards and provides for fundamental fairness.

The Texas common law method of assessing punitive damages has previously been reviewed by the Fifth Circuit Court of Appeals and the United States Supreme Court in the context of a due process challenge. In *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.428 (1991) (see attached Appendix 2 for applicable portions of Celotex Petition for Writ) and in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), Slip Opinion at p. 25, Celotex's challenge to constitutionality of the Texas law was denied. Texas common law has embraced the traditional common law approach for assessment of punitive damages.

As the United States Supreme Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1990):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the Trial and Appellate Courts to ensure that it is reasonable . . .
>
> . . .Since every State and Federal Court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

In *Haslip*, the Supreme Court analyzed the procedural protections that safeguarded and guaranteed the due process rights of the defendant. These procedural protections included objective criteria for the imposition of punitive damages in the form of Trial Court instructions and jury findings, post-trial review by the Trial Court and appellate review of the excessiveness of the award.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v.*

Longview Savings & Loan Association, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, if the award is challenged for excessiveness, the Trial Court, and Appellate Court must review the award of the jury for excessiveness. In making that review, the Trial Court and the Appellate Court *must* consider at least the following factors: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoer; 4) the situation and sensibilities of the parties; and, 5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.*, at 910. In addition, this Trial Court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by some of the Petitioners. (Respondents have no way to verify the accuracy of the Petitioner's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

A complete review of this record demonstrates that the jury was given: 1) clear objective criteria for the imposition of punitive damages; 2) the full panoply of procedural protections; 3) instructions describing the purpose of punitive damages as punishment and deterrence; 4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was no compulsory; 5) the Trial Court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review including the Petitioners' claim of multiple prior punitive damage awards; 6) the Appellate Court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the

award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded these Petitioners.

The Petitioners imply that the Alabama system is a precise model which must be adhered to for due process. The Fifth Circuit has rejected that precise argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991) at p. 30, wherein the Court stated:

> We get no indication from *Haslip* that the Court will scrutinize each State's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. *Texas meets those requirements.*

Clearly, Texas law provided for "fundamental fairness and safeguards in the award of punitive damages. The jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. Even though this specific award has not been challenged as excessive, the Trial Court and the Court of Appeals completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the Trial Court and the Appellate Court reviewed the claims of the Petitioners that previous awards should prohibit the imposition of this award.

Clearly, the lower Courts, The Federal Courts and the United States Supreme Court have recognized that the recovery of punitive damages ia na individual right and that the awards are based upon specific individual harm and conduct of the Petitioners as it relates to specific individual harm. Consequently, this Point of Error must be denied.

D. *The Court of Appeals Properly Applied Texas Law in Affirming the Award of Punitive Damages Against Fibreboard.* (Reply to Fibreboard Point of Error I)

Although Fibreboard describes this Point of Error as a misapplication of law, actually, Fibreboard is improperly attempting to raise a factual sufficiency argument in this Point of Error. Article V, Sec. 6 of the Texas Constitution establishes that the Supreme Court does not have jurisdiction to consider Points of Error attacking the factual sufficiency of the evidence to sustain or overturn a fact finding. *Ames v. Ames*, 776 S.W.2d 154, 159 (Tex 1980); *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 253 (Tex. 1983). Throughout this Point of Error, Fibreboard does nothing more than weigh what it perceives to be conflicting evidence. Clearly, this is a factual sufficiency analysis and this Court should deny the Application for Writ of Error.

In spite of the holdings of the Texas Supreme Court, these Petitioners maintain that punitive damages can only be recovered where the plaintiff proves by direct evidence the defendant's subjective state of mind. The defendants continually attempt to eliminate the ability of a plaintiff to prove gross negligence by proof that "under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others." Clearly, under the evidence in this case, these defendants are guilty of gross negligence and conduct demonstrating a conscious and reckless disregard for the rights and safety of the consumers and users of their products.

In *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, (Tex 1985), the Texas Supreme Court unequivocally states that in order to recover punitive damages and sustain a finding of gross negligence, a plaintiff need not prove a

defendant's subjective state of mind by direct evidence. A plaintiff may prove the defendant's gross negligence by either proving:

1. the defendant had *actual subjective knowledge* that his conduct created an extreme degree of risk; *or*

2. by providing that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others.

Williams, 699 S.W.2d at 573.

As stated by the Texas Supreme Court, "thus, the test for gross negligence is both an objective and subjective test." The reason Texas law provides for this rule should be apparent. The plaintiff is not always capable of making the defendant tell the truth or admit knowledge of the risk. As the Supreme Court states, to require only *direct evidence* of a defendant's subjective state of mind would leave outrageous conduct unpunished. Therefore, "a mental state may be *inferred* from actions." *Williams*, 699 S.W.2d at 573. Clearly, in light of the evidence presented in this case, the jury could *infer* the mental state of these defendants. Clearly, under the evidence presented in this case, the conduct of the defendants was outrageous and should be punished.

The following evidence proves that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others:

No. 92-1241

Petitioner, Owens-Illinois, Inc.

No. 92-1471

Petitioner, The Celotex Corporation

No. 92-1474

Petitioner, Fibreboard Corporation

No. 92-1502

Petitioner, Garlock, Inc.

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The petitions for writ of certiorari and this brief in opposition stem from a single trial held in the 4th Judicial District Court of Rusk County, Texas, on October 2, 1989 through October 19, 1989. Civil Action No. 86-363 (the *Pool* plaintiffs) was consolidated with Civil Action No. 88-08-293 (the *Williams* plaintiffs) and the cases were tried together. Petitioners herein appealed to the intermediate Texas appellate court, the Texarkana Court of Appeals. The Texarkana court set aside $100,000 in future medical expenses for one of the plaintiffs, set aside all exemplary damages assessed against Petitioner Garlock, and affirmed the remainder of the trial court judgment--this decision is reported in *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex. App.--Texarkana 1991, writ denied).

The Petitioners then filed separate applications for writ of error to the Supreme Court of Texas. The Supreme Court of Texas initially granted the applications for writ of error on April 29, 1992 and, after receiving the Respondents' brief in opposition, heard oral argument on the applications. The Supreme Court of Texas later withdrew its order granting the applications, holding that the applications had been improvidently granted, and then denied all of Petitioners' applications for writ of error.

GROUNDS FOR JURISDICTION

The Supreme Court of Texas entered its Order denying the Petitioners' applications for writ of error on November 11, 1992, and overruled all of the Petitioners' motions for rehearing on December 9, 1992. Petitioners allege jurisdiction in this Court pursuant to 28 U.S.C.A. § 1257 (1992). However, Respondents contest this alleged jurisdiction because:

1. Petitioners did not challenge the amount of the punitive damage award as excessive, nor did they challenge the evidence supporting the award of punitive damages. Therefore, Petitioners have waived any procedural due process challenge to the Texas common law method of review of punitive damages under *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991);
2. Petitioner Garlock's "Fourteenth Amendment due process challenge" is nothing more than a thinly-concealed attempt to persuade this Court to improperly consider and rule on *evidentiary* matters that are wholly within the province of the Texas courts who have heard this case; as such, Garlock's petition does not invoke the jurisdiction of this Court.

Garlock has previously urged only "no evidence" and "insufficient evidence" points of error on appeal, and the Texas courts have held that "there was sufficient evidence to support the findings against Garlock. These [Garlock's] points of error are overruled." *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687-688 (Tex. App.--Texarkana 1991, writ denied). Moreover, Garlock admits that it "did not specifically frame its no evidence challenge in the state courts in terms of the denial of due process under the Fourteenth Amendment," yet unabashedly represents to this Court that "Garlock's challenge to the plaintiffs' *lack of evidence*, though not explicit, has always been a due process challenge." Garlock's Petition for Writ of Certiorari, pages 3-4 (emphasis added). Garlock's petition certainly presents nothing for review by this Court; and

3. Petitioners have waived any potential substantive due process challenges and/or have not presented this Court with an adequate record for review with regard to their substantive due process arguments (*see* Reason No. II herein for denying the petitions).

CONSTITUTIONAL PROVISIONS INVOLVED

The petitions and this brief in opposition involve the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This is a product liability lawsuit for death and disease to five working men as a result of exposure to asbestos contained in products manufactured by the Petitioners. The basis of the lawsuit is strict liability for failure to warn of the known risks of exposure to asbestos. Each of these men worked as insulators or mechanics doing insulation and insulation repair work. During their careers, they worked with numerous products that contained asbestos made by these Petitioners and were never warned or told of the dangers associated with the use of the products. The diseases associated with exposure to asbestos include pleural changes, asbestosis, lung cancer, gastrointestinal cancer and mesothelioma. Respondents, Strong, Sledge and Pool developed pleural changes and asbestosis. Respondents, Williams and Freeman died of lung cancer.

This appeal involves specific jury findings of misconduct by the defendants and individualized harm to specific individuals. Petitioners, Owens-Illinois, Celotex, and Fibreboard did not challenge the amount of the punitive damage award as being excessive or unreasonable, in relation to the amount of actual damages awarded, before the Texas appellate courts. Petitioners, Owens-Illinois and Celotex did not challenge the sufficiency of the evidence to support the award of punitive damages.

Petitioners, Fibreboard and Garlock did challenge the sufficiency of the evidence to support the punitive damage award before the Texas Court of Appeals (at Texarkana). After reviewing all of the evidence, the Court of Appeals affirmed the verdict against Fibreboard and reversed the punitive damage award against Garlock. Fibreboard chose not to present an evidentiary challenge to the punitive damage award before the Texas Supreme Court.

The Texas Supreme Court initially granted writ of error for each of these Petitioners. Following oral argument,

the Texas Supreme Court entered an Order on November 11, 1992 stating that the writ of error was improvidently granted and, thus, affirmed the actual and punitive damages against Owens-Illinois, Celotex, and Fibreboard. The Order also affirmed the actual damages award against Garlock.

These petitions for writ of certiorari challenge the punitive awards against Owens-Illinois, Celotex and Fibreboard and the actual damages awarded against Garlock. The questions presented by Petitioners Owens-Illinois, Celotex, and Fibreboard have been previously reviewed by this Court, and petition for writ of certiorari denied, in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991) and *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 2097, 1099 (5th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992).

Contrary to the assertions of the Petitioners, the District Court, Court of Appeals and the Texas Supreme Court carefully reviewed the jury instructions, evidence, and award in light of the *Haslip* opinion. Furthermore, on at least two occasions, *King*, *supra* and *Glasscock*, *supra*, the Fifth Circuit has carefully analyzed the post-trial procedures for review of punitive damage awards by Texas law and found "that the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas system from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." *Glasscock*, *supra*. Clearly, the reversal of the punitive damage award against Garlock by the Court of Appeals illustrates the extent and thoroughness of the review of the Texas common law system. Therefore, this Court should deny these petitions for writ of certiorari.

SUMMARY OF THE ARGUMENT

Petitioners strain violently to liken this case to *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), a case in which this Court recently granted TXO's petition for writ of certiorari. However, a careful analysis of the facts underlying *TXO Production* and the specific issues urged by TXO in its petition soon reveals the fundamental differences in the two cases. Petitioners' reliance on *TXO Production* is misplaced.

Furthermore, Petitioners have waived their procedural due process complaints because they have never claimed on appeal that any of the punitive damage awards assessed against them was excessive, as required by Texas law. Nor have any of the Petitioners ever requested a remittitur of the damage awards. They have, quite simply, failed to properly preserve their procedural due process arguments for review by this Court.

Even assuming the Petitioners' complaints under *Haslip* are properly before this Court, no error is demonstrated under the circumstances of *this* case. Petitioners present only general arguments and commentary about Texas procedures that have repeatedly been deemed constitutional under *Haslip*. Review by this Court concerning the constitutionality of Texas law, with regard to procedural due process and punitive damage awards, has already been denied in at least two prior cases. In addition, the record in this case illustrates clear compliance at all levels with these Texas procedures.

Petitioners have also failed to bring forward a record that might somehow support their substantive due process complaints. The evidence in the record substantiating other punitive damage awards that have actually been paid by Petitioners is almost non-existent. Furthermore, there is no evidence in the record now before this Court proving that the transgressions of Petitioners in this case are the same that

occurred in any other case.

At any rate, the substantive due process arguments concerning the unconstitutionality of multiple punitive damage awards have been addressed many times, in favor of Respondents. This Court has similarly denied review of these substantive due process complaints.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. THE TEXAS COMMON LAW SYSTEM OF ASSESSING AND REVIEWING PUNITIVE DAMAGES DOES PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS.

Texas common law has embraced the traditional common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991):

> "Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable....
>
> "....Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to

overturn it."

Id. at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear, objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review, including the Petitioners' claims of multiple prior damage awards; (5) the Texas Court of Appeals and the Texas Supreme Court conducted full appellate review of the issues presented by the Petitioners.

The record also clearly demonstrates that the Petitioners did not avail themselves of the protections offered by the Texas common law system. The Petitioners did not challenge before the Texas appellate courts the amount of the punitive damage awards. Likewise, the Petitioners did not seek a remittitur of punitive damages. Petitioners, Celotex and Owens-Illinois did not challenge or ask the appellate courts of Texas to review the sufficiency of the evidence or the basis of the award of punitive damages. Petitioner, Fibreboard did raise a sufficiency of evidence challenge before the Texas Court of Appeals but voluntarily chose not to raise an evidentiary challenge to the evidence before the Texas Supreme Court. It is axiomatic that these Petitioners should not be allowed to challenge the sufficiency of the guidelines of review or the application of those guidelines if they fail to allege, complain or even attempt to demonstrate that the underlying award is improper.

In essence, these Petitioners are asking this Court to overturn the Texas system of review when they did not properly avail themselves of the procedural protections offered by Texas courts. Additionally, these Petitioners are asking this Court to overturn a punitive damage award that is admittedly based upon sufficient evidence and is not

excessive or unreasonable.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association*, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.* at 910. In addition, this trial court specifically reviewed, by post-trial motions and affidavits, the history of punitive awards as provided by these defendants (Plaintiffs have no way to verify the accuracy of the defendants' statements post-trial). Plaintiffs also verify that in response to questions before the Texas Supreme Court, counsel for Owens-Illinois and Celotex admitted that Owens-Illinois had paid only one punitive damage award of $500,000, and Celotex had paid only one punitive damage award of $175,000. Consequently, as the Fifth Circuit correctly stated in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, _____ U.S. _____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992), "the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas system from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." *Id.* at 1098-99.

Furthermore, the system of review was utilized successfully by Petitioner Garlock. Garlock successfully challenged the punitive award against it before the Court of

Appeals. Texas clearly meets the test of *Haslip* by placing meaningful restraints on jury discretion and by providing adequate post-trial review.

A. THE QUESTIONS PRESENTED IN *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES CORP.*, AND THE ISSUES UNDERLYING THOSE QUESTIONS, ARE NOT ANALOGOUS TO THE QUESTIONS AND ISSUES PRESENTED IN THIS CASE; THEREFORE, PETITIONERS CANNOT RELY ON *TXO PRODUCTION* IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI SUBMITTED IN THIS CASE.

Petitioners represent to this Court that their procedural due process rights have been violated in this case due to the jury's assessment of punitive damages against them. In support of this claim, Owens-Illinois, for example, boldly proclaims that:

> "This question is the same as that presented in the petition for certiorari recently granted by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S.Ct. 594 (1992). Just as in *TXO Production*, this is a case where the courts of a state have affirmed a very substantial award of punitive damages without observing the *Haslip* procedures."

Owens-Illinois' Petition for a Writ of Certiorari, page 5.

Owens-Illinois may have phrased the first question in its petition like the first question in TXO's petition (**see Appendix A**, TXO's Petition For a Writ of Certiorari, attached hereto), but the facts underlying the two cases could

hardly be more dissimilar.

This case is hardly "the quintessential example of punitive damages 'run wild'", as urged by TXO in its petition (where the punitive award against TXO was 526 times the compensatory award). *See*, Appendix A at page 9a.

As admitted by Petitioners, the ratio of punitive damages to actual damages in this case is approximately 1:1. In fact, the ratio is actually a little less than 1:1, as the jury awarded punitive damages totaling $5,000,000 and compensatory damages of $5,087,000. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 666 (Tex. App.--Texarkana 1991, writ denied). None of the Petitioners have ever challenged the proportionality of punitive damages to compensatory damages in this case, nor do they now present such a complaint to this Court.

Petitioners herein repeatedly emphasize and rely on this Court's granting of the petition for writ of certiorari in *TXO Production*. However, as this Court is well aware, the questions presented in *TXO Production* are not analogous to the questions now urged by Petitioners. For the sake of clarity, these differences include the following:

a. In its petition for writ of certiorari, TXO complains of the West Virginia Supreme Court's "really mean/really stupid defendant test" that was applied to the allegedly excessive punitive damage award against TXO; TXO maintains that this test is a *newly-created standard of review* that is so vague and arbitrary that it cannot possibly pass muster under the *Haslip* safeguards that protect procedural due process rights. In stark contrast, the Texas appellate court system has *not* arbitrarily formulated any sort of new test for appellate review of the size of a punitive damage award, nor do any of the Petitioners in this case raise such a question.

b. As mentioned above, TXO (in its second question presented for review) complains of "the wide 526-to-

one ratio" of punitive damages to actual damages in its case. Appendix A at page 21a. TXO emphasized that the four-to-one ratio in *Haslip* was "close to the line" of constitutional acceptability, and stressed that its factual scenario involved a business tort and was not a personal injury case. *Id.* TXO also pointed out that it had previously specifically argued "that the $10 million award violated substantive due process *because it was excessive* and disproportionate to the amount of the compensatory award." Appendix A at page 13a (emphasis added). TXO later argued its "unconstitutionally excessive" question and stated that its case "represents an extraordinary example of an overly lenient approach to excessiveness review....". Appendix A at page 25a.

However, none of the Petitioners in *this* case have ever argued on appeal that any of the punitive damage awards were "excessive" under Texas law, nor have Petitioners ever moved for or suggested a remittitur of the damages awarded by the jury in this case. Respondents emphasized these points in their brief filed with the Texarkana Court of Appeals (the intermediate Texas appellate court). *See*, **Appendix B** attached hereto, Brief of Appellees, at pages 35a, 37a. In its opinion, the Texarkana court acknowledged that the Appellants (including all Petitioners now before this Court) "have not sought a remittitur to reduce the amount of the punitive damages award." *Fibreboard Corp. v. Pool*, 813 S.W.2d at 686; *cf.*, *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1153 (5th Cir. 1990) (a case in which Celotex *did* ask for a remittitur of a punitive damage award). Similarly, Respondents brought the foregoing points to the attention of the Supreme Court of Texas in response to the various applications for writ of error urged by Petitioners.

See, **Appendix C** attached hereto, Brief in Response to Applications for Writ of Error, at pages 51a-54a, 56a, 60a, 63a; *see also*, **Appendix D** attached hereto, Response to [Petitioners'] Motions for Rehearing, at page 99a. Respondents will discuss these particular points, with regard to waiver, in more detail later in this brief.

In addition, Respondents have already illustrated for the Court that the ratio of punitive damages to actual damages (proportionality) is not an issue or question in this case, as it is in *TXO Production*. Moreover, this case is a personal injury action, involving both injury and death.

c. Finally, TXO proclaimed that a "separate compelling reason" existed for this Court to review its case. Appendix A at page 14a. The third question presented by TXO was:

> "3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment."

Appendix A at page 2a (discussion and argument at pages 12a, 25a-28a).

Therefore, the reliance of Petitioners on *TXO Production* is obviously misplaced. Furthermore, the questions now presented by Petitioners in this cause have been waived, or have already been considered and denied by this Court, as the following paragraphs will illustrate. As a consequence, none of the four petitions present anything for review by this Court.

B. NONE OF THE PETITIONERS HAVE EVER

CLAIMED ON APPEAL THAT THE PUNITIVE DAMAGE AWARDS WERE EXCESSIVE IN RELATION TO THE ACTUAL DAMAGES AWARDED THE RESPONDENTS IN THIS CASE, NOR HAVE ANY OF THE PETITIONERS EVER SOUGHT A REMITTITUR OF THE PUNITIVE (OR ACTUAL) DAMAGE AWARDS; THEREFORE, PETITIONERS HAVE WAIVED ANY POTENTIAL PROCEDURAL DUE PROCESS CHALLENGE UNDER *HASLIP* AND HAVE FAILED TO INVOKE THE JURISDICTION OF THIS COURT.

Owens-Illinois complains that:

> "The trial court failed to provide Owens-Illinois with a post-trial hearing *on the excessiveness of the punitive damages award* and did not state any reasons for affirming the award."

Owens-Illinois Petition for Writ of Certiorari, page 6 (emphasis added).

However, Owens-Illinois has not shown this Court that it *asked for* any such post-trial hearing. Rule 324(b)(4) of the Texas Rules of Civil Procedure specifically requires that a point concerning "[a] complaint of inadequacy or excessiveness of the damages found by the jury *must* be included in a motion for new trial as a prerequisite to presenting such a complaint on appeal."

On November 30, 1989, Owens-Illinois did file a motion for new trial following the jury's verdict in this case; that motion, along with all of the other post-trial motions filed by Owens-Illinois and the other Petitioners, was heard by the trial court on December 27, 1989, and was overruled by the trial court on January 8, 1990. *See*, Owens-Illinois' Petition for a Writ of Certiorari, Appendix E (pages 87a-88a), and Appendix G (pages 92a-93a).

But, an examination of Owens-Illinois' motion for

new trial (its Appendix E) reveals that Owens-Illinois did *not* complain about the excessiveness of any of the damage awards assessed by the jury, including punitive damages.

Owens-Illinois did urge a *substantive* due process complaint ("repeated imposition of punitive damages against Owens-Illinois for substantially the same conduct") in its motion for new trial, but did not complain that the punitive damage award against it was excessive--Owens-Illinois did aver that its alleged substantive due process complaints violated the excessive fines clause of the Texas Constitution, but that is not the equivalent of a complaint of excessive damages. *See eg., King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1029 (5th Cir. 1990), _____ U.S. _____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991).

Conversely, *Haslip* involved due process challenges to a judgment awarding punitive damages following a complaint that the award was excessive--as Respondents emphasized in their brief filed with the Supreme Court of Texas. *See* Appendix C at page 51a-52a; *see also, Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1044 (1991).

None of the Petitioners have ever complained on appeal that the punitive damage awards in this case were excessive, nor did they request a remittitur of any of the punitive damage awards. Therefore, Petitioners have failed to properly preserve their *Haslip* procedural due process complaints for review by this Court.

Further evidence of waiver is shown by the Petitioners' failure to request additional instructions to guide the jury. *See eg., McCleary v. Armstrong World Industries, Inc.*, 913 F.2d 257, 260 (5th Cir. 1990). All of the Petitioners complain generally of the alleged lack of constraint on the discretion of Texas juries, yet none of them are able to show this Court that they requested any additional constraints on the jury in *this* case. For example, Celotex argues (generally) that:

"Juries are given no guidance in their award,

> are not instructed of prior punishment for identical conduct, and the resulting verdict is arbitrary and capricious."

The Celotex Corporation's Petition for a Writ of Certiorari, Appendix F at page 83a.

Yet, Celotex does not show this Court how, when and where it *asked for* such an instruction to be given to this jury.

C. ALTERNATIVELY, THE RECORD IN THIS CASE CLEARLY SHOWS THAT PETITIONERS WERE AFFORDED ALL OF THE *HASLIP* PROCEDURAL DUE PROCESS SAFEGUARDS UNDER TEXAS LAW.

The procedural due process arguments made by Petitioners challenging the adequacy of Texas law under *Haslip* have already been considered and denied by this Court.

For the sake of brevity, Respondents refer the Court to Appendix C attached hereto, pages 60a-62a, which clearly outlines how the Texas common-law method of assessing punitive damages has already been reviewed by the Fifth Circuit and this Court in the context of a procedural due process challenge under *Haslip*, and how the Texas procedures have been pronounced constitutionally sound. Most recently, the Fifth Circuit has stated:

> "We conclude that Texas procedures for assessing and reviewing punitive damage awards *satisfy the requirements of due process*.
>
> .....
>
> "We get no indication from *Haslip* that the Court will scrutinize each state's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. *Texas meets those requirements*."

Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1097, 1099 (5th Cir. 1991), *cert. denied*, _____ U.S. _____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992) (emphasis added); *see also*, *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992).

The Texas district court properly followed established Texas procedure in this case. *Cf.*, *Brown v. Petrolite Corp.*, 965 F.2d at 49. On appeal, the Texarkana Court of Appeals examined the trial court's verbal instructions and the written charge given to the jury in this case and concluded that "the punitive damage award was based on an objective criterion, and thus, the [procedural] due process provision of the fourteenth amendment was not violated." *Fibreboard v. Pool*, 813 S.W.2d at 686; *see also*, Appendix B at pages 40a-43a. As in *Haslip* and *Glasscock*, the district court in the case at hand "imposed limitations on the exercise of the jury's discretion to award punitive damages." *See*, *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1097-98.

Furthermore, the intermediate Texas appellate court was required to--and did--examine the reasonableness of the punitive damage awards in conformity with the factors set forth in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). *See*, *Fibreboard v. Pool*, 813 S.W.2d at 686-87; *see also*, *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992); Appendix C at pages 61a-62a. The Texarkana court concluded:

> "The present case focuses on a lack of adequate warnings. *The exemplary damages awarded in this case were* not based upon the companies' conduct in manufacturing and distributing asbestos, but, according to the wording of the jury questions, was *based upon the failure to warn those handling the product of its potential dangers.*"

Fibreboard v. Pool, 813 S.W.2d at 678 (emphasis added).

Significantly, the Texarkana Court of Appeals later emphasized that:

> "The wrongful conduct was a failure to warn about the use of a product which could result in serious illness and death by suffocation....".

Id. at 687.

After examining all of the evidence in the record on appeal, the appellate court concluded:

> "In relationship to the actual damages and the nature of the wrong, as well as the other factors, the record supports the award of punitive damages."

Id.

Under the circumstances of *this* case, the Texas procedures for assessing and reviewing the punitive damage awards satisfied procedural due process. *Cf.*, *Glasscock v. Armstrong Cork. Co.*, 946 F.2d at 1099. And, as recognized by the Fifth Circuit,

> "...the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas systems from the simplistic 'passion and prejudice' analysis referred to in *Haslip*."

Id. at 1098-99.

Furthermore, Respondents take exception to Fibreboard's misleading proclamation that "Texas appellate courts do not review the whole record." Fibreboard Corporation's Petition for a Writ of Certiorari, page 14. This broad, generalized comment is not an accurate statement of Texas law. Petitioners fail to mention that they asserted a myriad assortment of "no evidence" points of error *and* "insufficient evidence" points of error on appeal. After initially submitting over 100 collective points of error, Petitioners were requested to consolidate these points, and eventually filed separate briefs setting out 38 different points of error. *Fibreboard Corp. v. Pool*, 813 S.W.2d at 666. Many of these points of error were insufficient evidence points of error. In considering an insufficient evidence point

of error, intermediate appellate courts in Texas are required to consider and weigh *all* of the evidence in order to determine if a jury's finding is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988); *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986); *Dyson v. Olin Corp.*, 692 S.W.2d 456 (Tex. 1985); *In re King's Estate*, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951). Accordingly, the Texarkana court properly considered and weighed all of the evidence in this case many times over, and specifically reviewed all of the evidence in affirming the punitive damage award against Fibreboard.

Respondents emphasize that Texas appellate evidentiary review of punitive damages has been closely reviewed and has never been found to be unconstitutional in any manner, shape or form.

II. MULTIPLE PUNITIVE DAMAGE AWARDS DO NOT OFFEND THE CONCEPT OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT; IN THIS CASE, THE ASSESSMENT OF PUNITIVE DAMAGES IS RELATED TO SPECIFIC INDIVIDUAL HARM AND IS NOT VIOLATIVE OF SUBSTANTIVE DUE PROCESS.

A. PETITIONERS DO NOT PRESENT THIS COURT WITH AN ADEQUATE RECORD IN SUPPORT OF THEIR SUBSTANTIVE DUE PROCESS COMPLAINTS.

Petitioners' general assertions that multiple punitive damage awards violate substantive due process present nothing new for review by this Court. The Fifth Circuit has addressed, and rejected, this particular claim many times. *See, Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1096-97, *cert. denied*, _____ U.S. _____, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992); *King v. Armstrong World Industries*,

Inc., 906 F.2d at 1029-30, *cert. denied*, _____ U.S. _____, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991); *see also*, *McCleary v. Armstrong World Industries*, 913 F.2d 257, 260-61 (5th Cir. 1990); *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1154-55 (5th Cir. 1990). As reflected in the foregoing citations, this Court denied the petitions for writ of certiorari that urged this specific constitutional argument, and foreclosed this complaint, in *Glasscock* and *King*. Respondents' summary of the foregoing case law and their arguments presented to the Supreme Court of Texas concerning this constitutional issue is found in Appendix C attached hereto, at pages 54a-60a. *See also*, *Fibreboard v. Pool*, 813 S.W.2d at 687. Close scrutiny of the various petitions presented to this Court reveals only general comments and general arguments concerning matters already denied review.

Respondents are, however, compelled to once again emphasize that each of them has their own cause of action against the Petitioners--a cause of action *unique* to each individual Plaintiff/Respondent. Each was also possessed of a right to seek, and justify in the record, punitive damages for every Petitioners' willful and intentional failure to warn about the dangers of asbestos. *See*, *Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1096. Every Respondent in this case assumed these burdens of proof at trial, and proved the same to a jury of their peers. Moreover, the appellate courts of Texas have addressed all of the complaints of Petitioners in this vein, and have found them lacking. Petitioners' "single course of conduct" argument is perhaps best answered by the Fifth Circuit's straightforward reply to this complaint:

> "There is no principle in law limiting recovery of punitive damages to the first claimant."

Id. at 1096-97.

These punitive damage awards, and every punitive damage award involving asbestos injury, have been specifically related to an individual plaintiff. No recovery

was ever made on behalf of all that are harmed, nor could such an award be assessed. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual, from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded.

The reasoning of Owens-Illinois seems particularly flawed in that it ignores the definition of "exemplary damages" provided to the jury in *this* case. Each of the jury questions, concerning each individual Petitioner, contained the following definition:

> "'EXEMPLARY DAMAGES' means an amount that you may in your discretion award *as an example to others* and *as a penalty or by way of punishment*, in addition to any amount you may have found as actual damages."

Fibreboard v. Pool, 813 S.W.2d at 693, n.9 (emphasis added); *see also*, Appendix B at page 42a.

As the Texarkana Court of Appeals so succinctly stated:

> "Under the terms of this definition, it is difficult to believe that the jury could base its findings on anything *other than the conduct which caused the injuries*."

Fibreboard v. Pool, 813 S.W.2d at 693 (emphasis added).

Some of the Petitioners discuss the existence of other alleged civil awards against them and urge this point in support of their substantive due process complaints. *Cf.*, *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. at 1045. Incredibly, the Fibreboard Corporation argues this point in support of its petition, but has never presented evidence of any other punitive damage awards at any stage of this litigation. *See*, Fibreboard Corporation's Petition for a Writ of Certiorari, pages 16-17; *see also*, Appendix C at page

58a. Fibreboard's unsupported argument is yet another example of the glaring failure of all Petitioners to present this Court with an adequate record to support their contentions.

Notwithstanding the insufficient record to support their argument, Petitioners urge that it is the combination of past awards and the potential of future awards that violates due process. Interestingly, in the twenty years of litigation following *Borel v. Fibreboard Products Corp.*, 493 F.2d 1076 (5th cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974), Owens-Illinois claims the existence of over 70,000 lawsuits, but by affidavit can only demonstrate seven cases where punitive damages have been awarded.

Nevertheless, the Petitioners argue that all future plaintiffs' rights should be foreclosed because of a previous punitive damage award relating to a different specific individual with different injuries. Such a holding by this Court would result in the overturning of a jury verdict that is admitted to be based on sufficient evidence and not excessive, because of a single post-trial affidavit that is not verified by any independent party. Furthermore, such a holding by this Court would arbitrarily discriminate between injured men and women and force a race to the courthouse to secure the initial and only award.

Absent a relationship, as exists under Texas law, between individual harm and the punitive award, how is this Court or any court to determine the number or amount of awards to be allowed before foreclosing future injured people? Is one award enough or ten too many, when over 70,000 have been injured? Are we to fashion public policy to reflect that if one person is injured or killed, punitive damages may be recovered, but not if 70,000 are injured or killed? A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of harm or the *potential* of future awards, completely destroys the policies

of fairness, justice and deterrence.

Likewise, Owens-Illinois' Appendices E and F (pages 87a-91a) vaguely aver that Owens-Illinois "has been subjected to punitive damage verdicts" that total more than four million dollars. What does this mean? This post-trial "evidence" certainly does not establish actual *payment* of any such awards, nor does it conclusively reflect entry of judgment, the signing of any judgment, settlement, etc. Moreover, this alleged proof was never presented to the *jury* for consideration. *Cf.*, *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2nd Cir. 1990), *cert. dism'd*, 497 U.S. 1057, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990).

Similarly, Celotex's Appendix F (pages 82a-95a) reflects payment of only two punitive damage awards, totaling $175,000. *See also*, Appendix C attached hereto, at page 24. And, once again, these payments were not disclosed to the jury in this case. Fibreboard's petition and appendices contain no reference at all to other punitive damage awards.

It is clear that the "record" relied upon by Petitioners is simply insufficient to permit an examination of their claims that there are multiple awards of punitive damages offensive to the fundamental fairness principles embodied in substantive due process. This Court should deny any review of this issue, for the same reason the Second Circuit declined to set aside a punitive damage award:

> "...there has been insufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."

Johnson v. Celotex Corp., 899 F.2d 1281, 1287 (2nd Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S.Ct. 297, 112 L.Ed.2d 250 (1990); *see also*, *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2nd Cir. 1989).

Finally, aside from actual payment of any other punitive damage awards, Petitioners present little--if any--

proof that the grievous misconduct in this case is the same misconduct that occurred in any other case. Their appellate record in this regard is entirely insufficient and does not begin to justify review. *See*, *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 281.

The Petitioners were afforded the full protection of due process, received a fair trial and complete appellate review. Consequently, the petitions should be denied.

III. THE TEXAS SUPREME COURT AND THE COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, PROPERLY AFFIRMED THE TRIAL COURT JUDGMENT AGAINST GARLOCK UNDER STRICT LIABILITY FOR ACTUAL DAMAGES BECAUSE THE EVIDENCE ESTABLISHED THAT GARLOCK KNEW OR SHOULD HAVE KNOWN OF THE DANGERS OF ITS PRODUCTS, THAT THE PRODUCTS WERE DEFECTIVE FOR FAILURE TO WARN AND THAT GARLOCK CONTRIBUTED TO CAUSE THE PLAINTIFFS' INJURIES.

Petitioner Garlock improperly asks this Court to reconsider and weigh evidentiary matters that are wholly within the province of the Texas courts. Garlock has previously urged only "no evidence" and "insufficient evidence" points of error on appeal, and the Texas courts after reviewing all of the evidence have held that "there was sufficient evidence to support the findings against Garlock. These (Garlock's) points of error are overruled." *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687-688 (Tex. App.--Texarkana 1991, writ denied).

Garlock admits that it "did not specifically frame its no evidence challenge in the state courts in terms of the denial of due process under the Fourteenth Amendment." Garlock's Petition for Writ of Certiorari, pages 3-4. In fact, Garlock never mentioned due process or the Fourteenth Amendment before the Texas court. Incredibly, Garlock

now fabricates a "presumption of liability," distorts the opinion of the Texas Court of Appeals, and completely ignores the direct evidence on each element of the plaintiff's cause of action contained in the record, in a thinly veiled attempt to invoke the jurisdiction of this Court.

Contrary to the assertions of Garlock, the Texas Court of Appeals, Sixth District, specifically addresses Garlock's products and the appropriate authorities at *Pool*, 813 S.W.2d at 687-688. The Court of Appeals correctly cites case authority and the application of the record to that authority and unequivocally finds sufficient evidence to support the jury's findings. The Court does not rely on a "presumption of liability," but rather quotes the direct evidence applicable to Garlock's products and the causation of the injuries to the plaintiffs.

Under Texas law, a manufacturer of a defective product may be liable under the theory of strict liability in tort as expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1964). *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1964).

The bedrock authority in an asbestos case is the Texas diversity opinion of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974). In discussing the failure to warn cause of action, the Fifth Circuit quoted comment (j) to section 402A, for the underlying principle that a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. *Id.* at 1088.

A. *Garlock's Products are Defective.*

Garlock's products were properly proven defective by expert testimony of Dr. Joseph Wagoner, Dr. Jeff Britton, and through cross-examination of Garlock's expert witness, Dr. Clark Cooper. Respondents demonstrated, through numerous medical and scientific articles beginning in 1898

and expert testimony, the dangers of asbestos exposure and that there was *no safe level* of exposure to asbestos. *See*, *Fibreboard Corp. v. Pool*, 813 S.W.2d at 687-88.

Concerning Garlock's reliance on Threshold Limit Values (TLV's) Dr. Waggoner testified that, in the New York Academy of Sciences, it was reported by a member of industry:

> "The TLV's are industry's values, but industry generally does not develop anywhere near enough kinds and amounts of data that can be used to establish a TLV of a new substance, but industry has the sole responsibility to develop data on its own products. Government is not in a position to develop enough facilities to handle the problem in total, nor should it when reliable toxicological consultants are now available."

Appendix C at page 90a.

Dr. Wagoner also testified, as a member of the committee that adopted the industry TLV's, that the standard was lowered. More importantly, he repeatedly emphasized that the government recommendation included not only suppression of dust below the TLV, but also, *that the TLV be coupled with worker education*, a *respirator program*, and *warning labels*. Garlock continually asserts only part of the recommendation. The rest of the recommendation clearly requires *warning the consumer which is the basis of this lawsuit*. Appendix C at page 90a.

B. *Garlock Products were Used by the Plaintiffs and Contained Asbestos.*

Mr. Charles Strong testified that Garlock made three or four types of asbestos packing and gasket material that these men worked with at Texas Eastman. Mr. Strong positively identified from a Garlock product book, Garlock 257, Garlock 252, Garlock asbestos yarn and Garlock sheet gasket material. Appendix C at page 92a. Mr. Strong also

described the products and how he and the other plaintiffs used the material. He stated that these products were used at Texas Eastman in the '50's, '60's and '70's. He testified that these products manufactured by Garlock contained asbestos. Appendix C at page 92a.

Mr. Charles Kimball Flint, the purchasing agent for Texas Eastman, also testified concerning Garlock products. Appendix C at page 92a. Mr. Flint testified that he had purchased products from Garlock that contained asbestos. Appendix C at page 92a. He testified that he remembered purchasing *compressed asbestos sheet packing* and *square braided asbestos packing* that would be used for *sealing joints* and *for packing pumps or packing valves*. Appendix C at page 92a. He also testified that the asbestos sheet packing was a gasket material that had to be cut to be used and was used in all the buildings in Texas Eastman, "plant-wide." Appendix C at page 92a.

Obviously, completely contrary to Garlock's assertions, these men testified to use of specific Garlock products that contained asbestos in the 1950's, 1960's and 1970's. Plaintiffs, Freeman, Strong, Sledge and Pool worked together at Texas Eastman, and used the same products in the same manner. Appendix C at page 92a.

C. *Garlock Products Released Asbestos Fiber when Used in a Foreseeable Manner.*

Mr. Charles Strong specifically testified that Garlock products had to be replaced and when being replaced, were dusty. Appendix C at page 92a. In the process of removing the old worn out packing material, it was necessary to scrape it, beat it, and pull on it. Appendix C at page 93a. He further testified that this work was performed throughout the years he worked at Texas Eastman. Appendix C at page 93a. He also described cutting the gasket material many times with pocket knives and machines and every time it was cut, asbestos dust and fibers were released. Appendix C at page 93a.

Clearly, it is foreseeable by the manufacturer of packing and gasket material that gasket material will become dry, worn out and have to be replaced. Garlock knew its products were used in refineries and large plants and is charged with knowing the foreseeable use, application and removal of its products. *Borel v. Fibreboard Paper Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 2107 (1974). Garlock has never asserted that these men were not using their products in a foreseeable manner.

Garlock *incorrectly states that Dr. Wagoner did not testify concerning the dangers of asbestos in this type of product or used in this manner.* Dr. Wagoner, referring to articles published in *1932* and *1935* discussing conditions under which *asbestosis* was known to occur, found that the people were working with "*packing and joining.*" Appendix C at page 93a. He continued citing publications in 1960 where the diseases asbestosis and associated cancers were found in people working as "*asbestos packer*" and "*unpacker.*"

Clearly, sufficient evidence was presented concerning the release of asbestos fibers from Garlock products when used in a foreseeable manner and the association of asbestos-related disease with the use of this type material.

D. *Garlock Failed to Warn.*

Mr. Strong and all the plaintiffs testified that there was not a warning on any box of insulation used in Texas Eastman. Appendix C at page 94a. He further testified that no one from Garlock ever gave him any kind of a warning concerning the dangers of asbestos. Appendix C at page 94a.

Finally, Mr. Flint, the purchasing agent for Texas Eastman, testified that he had never received any type of warning or instructions concerning products containing asbestos. Appendix C at page 94a.

E. *Sufficient Evidence Exists in the Record that Exposure*

to Garlock Products is a Producing Cause of Plaintiffs Injuries

Through the testimony of Dr. Wagoner and Dr. Britton, sufficient evidence exists to support the jury finding that exposure to Garlock's products was a producing cause of the Plaintiffs' injuries. Dr. Wagoner described the dose-response nature of asbestos-related disease. Appendix C at page 94a. Dr. Britton testified that a small amount of exposure, even for a single day, can stimulate some degree of the disease process. Appendix C at page 91a. All doctors agreed that it is the cumulative exposure over many years that causes the asbestos-related diseases.

Finally, Garlock quotes and relies on *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985). In *Gideon*, there was no evidence that Gideon's inhalation of a relatively small amount of asbestos fibers was a substantial factor in causing his condition. *Id.* at 1145. Respondents in this case provided testimony of Dr. Britton concerning the effect of inhalation of asbestos, even in small amounts. Respondents also established substantial exposure to asbestos fibers from Garlock products used throughout the plant over a 30-year period.

Garlock quotes *Gideon* for the statement that "[c]ompliance with such governmental safety standards constitutes strong and substantial evidence that a product is not defective." *Id.* at 1144. This quote is made by the court pursuant to a *factual* sufficiency argument. Respondents don't suggest that compliance is not some evidence of no defect, but it does not *conclusively establish* the fact. The Fifth Circuit specifically said:

> "We reach this conclusion only on the record before us and do not hold that such proof might not be possible in another case."

Id. at 1145.

In contrast to *Gideon*, the evidence demonstrated that the exposure and causation in this case was substantial and

extends over several decades. Respondents elicited specific testimony on each of the missing facts of *Gideon*. Clearly, Garlock's petition should be denied.

CONCLUSION

The Texas common law system of review of a punitive damage award clearly satisfies the requirements of *Haslip* and due process. Furthermore, these Petitioners did not avail themselves of the protections of that system nor did they preserve an adequate record to substantiate their contentions.

Specific and substantial evidence was presented concerning Garlock's products and the causation of the injuries to the Respondents. Therefore, Respondents respectfully request that these petitions for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A -- TXO's Petition For a Writ of Certiorari, in *TXO Production Corp v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, 113 S.Ct. 594 (1992).

APPENDIX B -- Brief of Appellees (this appendix contains selected excerpts from the appellate brief filed by Plaintiffs/Appellees, the Respondents now before this Court, with the Texarkana Court of Appeals).

APPENDIX C -- Brief in Response to Applications for Writ of Error (this appendix contains selected excerpts from the appellate brief filed by Plaintiffs/Respondents with the Supreme Court of Texas).

APPENDIX D -- Response to Motions for Rehearing (filed by Plaintiffs/Respondents with the Supreme Court of Texas).

APPENDIX A

No. 92-479 FILED SEPT. 17,1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

TXO PRODUCTIONS CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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CONSTITUTIONAL PROVISION

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In The
Supreme Court of the United States
October Term, 1992

No.

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

TXO Production Corp. petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-52a) is not reported. The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (App., *infra*, 53a-54a), is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix (App., *infra*, 55a-74a) as is the court's written order. (App., *infra*, 75a-76a). The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (App., *infra*, 77a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. A petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

This case presents the quintessential example of punitive damages "run wild." *Pacific Mut. Life Ins. Co. V. Haslip*, 111 S.Ct. 1032, 1043 (1991). The dispute began as a declaratory judgment action brought by petitioner TXO Production Corp. ("TXO") to interpret a mineral severance deed. It resulted ultimately in a jury award against TXO of $19,000 in compensatory damages and $10 million in punitive damages on defendants' counter-claim for slander of title. Although the punitive award was 526 times the compensatory award, and was rendered without the procedural safeguards that this Court found to be crucial in *Haslip*, and that the Supreme Court of Appeals of West Virginia itself had held to be mandated under *Haslip*, the judgment was affirmed on appeal.

1. In the summer of 1984, TXO became interested in leasing a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. App., *infra*, 7a-8a. The title holder, Tug Fork Land Company ("Tug Fork"), had leased the oil and gas development rights. The lease had been assigned to Alliance Resources Corporation ("Alliance"). App., *infra*, 7a. In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving an overriding royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. App., *infra*, 8a-9a & n.1.

TXO thereafter retained a West Virginia law firm to perform a title examination prior to drilling a well. App., *infra*, 9a. TXO's attorneys found a problem with the title,

opining that in a 1958 deed, Tug Fork had conveyed to one Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[1] App., *infra*, 9a; Tr. 388-90; 409-12[2]

TXO was unwilling to invest over $200,000 in drilling an oil and gas well on the property until it had cleared any potential cloud on the title. See App.,*infra*, 12a. Accordingly, TXO obtained and recorded a quitclaim deed in which TXO was granted any rights that Virginia Crews might have to the property. App., *infra*, 11a.

Thereafter, TXO called a meeting with Alliance. The West Virginia Supreme Court characterized TXO's actions at that meeting, taken together with TXO's failure to discuss the title problem with respondents prior to having recorded the quitclaim deed, as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." App., *infra*, 11a-12a.

2. Shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. App., *infra*, 12a. Respondents counter-claimed,

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1. In reaching this conclusion, counsel relied upon the language in the 1958 deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex.3).

2. The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec" The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. _____"; they are not otherwise paginated in the record.

alleging the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, and that the recording of the quitclaim deed on July 11, 1985, constituted a slander of their title to the Blevins tract.

The question whether there was in fact a defect in the chain of title was tried to the court in a bifurcated action. On December 17, 1987, without taking any evidence, the court ruled that title was vested in Tug Fork. App., *infra*,12a; Rec. 691-722.

In June of 1990, the case on the counterclaim for slander of title went to trial before a jury. The jury found for respondents, and awarded $19,000 to compensate respondents for their attorney's fees incurred in defending the declaratory judgment action brought by TXO. App., *infra*, 12a, 20a. No award was made for any actual damage to respondents' property rights or to their ability to sell or lease the property. See App., *infra*, 20a. Although it found no actual property damage, the jury awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.[3]

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award

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3. Over TXO's objections, respondents presented hearsay testimony of unrelated "other acts" of TXO. App., *infra*, 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in cases filed in those states, wholly unrelated to the parties, facts, or underlying cause of action in the case at bar. App., *infra*, 21a-24a. The West Virginia Supreme Court approved the admission of this testimony under West Virginia's "catch-all" exception to the hearsay rule. App., *infra*, 30a-32a.

given the lack of harm to respondents, and the absence of meaningful standards for the jury and the trial court in determining the severity of the award. App., *infra*, 55a-69a. The court, without explanation, denied the post-trial motions from the bench. App., *infra*, 72a.

3. The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual Life Insurance Co. V. Haslip, supra*, 111 S.Ct. 1032, and applied by West Virginia Supreme Court in *Garnes V. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (on remand from the United States Supreme Court, 111 S.Ct. 2882 (1991).[4] App., *infra*, 7a, 32a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," set out a detailed procedure for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. This procedure was designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, the trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of the punitive award. App., *infra*, 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to taken into consideration by the trial court upon its review of the award. App., *infra*, 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same

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4. Both *Haslip* and *Garnes* were decided after TXO's motion for judgment *n.o.v.* had been ruled upon.

factors. *Garnes*, 413 S.E.2d at 910. In *Garnes*, the West Virginia Supreme Court reversed the judgment, and remanded the case for a new trial to be conducted under the requirements the court had articulated. *Id.* at 910-11.

The West Virginia Supreme Court, however, took a different course with respect to TXO. Although the court recognized that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*," App., *infra*, 35a, it decided not to apply these guidelines retroactively to cases tried before the *Garnes* decision, thereby denying TXO these due process protections. App., *infra*, 32a.

Additional, the court rejected TXO's claim that the $10 million award violated substantive due process because it was excessive and disporportionate to the amount of the compensatory award. See App., *infra*, 40a. Purporting to set out "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages," App., *infra*, 35a, the court concluded:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

App., *infra*, 36a, 51a-52a. The court then explained that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is *roughly* five to one." App., *infra*, 38a (emphasis in original). By contrast, according to the court, "[w]hen the

defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant . . . . [In such cases] . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." App., *infra*, 39a. Based upon the "really mean"/"really stupid" test, the court concluded that the $10 million award against TXO was acceptable. App., *infra*, 40a[5]

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Appeals of West Virginia in this case denied petitioner TXO the procedures approved by this Court in *Pacific Mutual Life Insurance Co. V. Haslip*, 111 S.Ct. 1032 (1991), as satisfying the Fourteenth Amendment; it established a new test for appellate review of the size of a punitive award that is inherently arbitrary and thus itself violates due process; and it approved an award so grossly excessive and disproportionate to actual injury that it constitutes a denial of due process. The West Virginia Supreme Court's decision is in conflict with other state-and federal-court decisions rendered post-*Haslip*. This Court's review is therefore necessary to resolve those conflicts and to ensure that defendants in cases involving punitive damages are afforded the protections due under *Haslip*.

A separate compelling reason exists for the Court to review this case. The West Virginia Supreme Court declined

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5. Chief Justice McHugh, joined by Justice Miller, wrote separately, criticizing the "ridiculous categorization" adopted by the majority to determine what level of punitive damages is permissible. Specifically, the Chief Justice denounced the majority's "use of such subjective and nontechnical terms as 'really mean' and 'really stupid'" as a "cavalier attempt to be clever and amusing." App., *infra*, 53a-54a.

to afford TXO the process that, in *Garnes V. Fleming Landfill, Inc.*, 413 S.E.2d 897, it had earlier held are mandated under *Haslip*, and that it had applied to the parties in that case. By refusing to apply its *Garnes* due process standards to this case, the West Virginia Supreme Court acted in a manner contrary to the principles of retroactivity law animating this Court's decision in *James B. Beam Distilling Co. V. Georgia*, 111 S.Ct. 2439 (1991). This Court should grant review to decide whether, under *James Beam*, state courts must retroactively apply decisions interpreting federal law.

1. In *Haslip*, this Court emphasized that the *three layers* of safeguards provided by Alabama's scheme for imposing punitive damages were vital to its decision upholding the award of punitive damages in that case. 111 S. Ct. at 1046. Under Alabama's system, these safeguards were provided through the jury instructions, post-trial review conducted by the trial court on the record, applying specific criteria, and appellate review, also applying specific criteria. *Id.* at 1044-46. By contrast, TXO was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. Nor was TXO afforded the sort of appellate review this Court found essential to provide a "definite and meaningful constraint on the discretion of [the] fact finders." *Id.* at 1045. The West Virginia Supreme Court approved a $10 million award made without the procedural protections that are constitutionally required. It is unsurprising that this approval is in conflict with other courts' views of what due process requires under *Haslip*.[6]

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6. What makes the holding particularly worthy of review by this Court is that the West Virginia Supreme Court is not the only court that has adopted a cavalier approach to *Haslip*. *See, infra*, notes 10 and 11.

a. Under the Alabama procedure approved in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so. . . . Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging other from similar conduct,'. . . . and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (citations omitted) (quoting *Hammond V. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

Here, in stark contrast to the approved approach, the trial court summarily denied TXO's post-trial motions from the bench. App., *infra*, 74a. The absence of any post-verdict review on the record deprived TXO of its full due process rights. Yet, the West Virginia Supreme Court found no constitutional infirmity. App., *infra*, 7a.

In several recent cases, other trial courts' summary approvals of punitive damages awarded by juries have been held to violate due process under *Haslip*. In *American Employers Insurance Co. V. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the jury had awarded $400,000 in compensatory damages and $750,000 in punitive damages against an insurance company on a bad-faith claim. The jury instruction was "substantially similar to the one in *Haslip*," 931 F.2d at 1464, but the trial court denied defendant's motions for judgment *n.o.v.* or, in the alternative, for a new trial and remittitur "without comment," *id.*, as the trial court did here. The Eleventh Circuit found that this summary denial did not meet the *Haslip* standards for post-trial review, and remanded for the trial court to set forth in the record its review of the factors approved in *Haslip*. *Id.*

Likewise, the Eighth Circuit has on two occasions expressed concern over the record's lack of a "meaningful and adequate review by the trial court" of punitive damages awards, *Haslip*, 111 S. Ct. at 1044, and has remanded those cases for such a review to be placed on the record. Thus, in *Cole V. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the jury awarded $2 million in punitive damages, 13 1/3 times more than the compensatory award of $150,000. In reviewing the defendant's due process challenge to the punitive award, the court's concern over "whether the district court . . . appropriately reviewed the punitive damage award" caused it to remand the case "so that the district court [might] conduct this review under the standards articulated in *Haslip*." 947 F.2d at 320.

And in *Robertson Oil Co. V. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), the plaintiff was awarded $750,000 in compensatory damages and $8 million in punitive damages. The court first found that the jury instructions were adequate under *Haslip*. *Id.* at 1347. Then the court observed the "*Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards." *Id.* The court concluded that the punitive award had to be vacated because the district court, like the trial court here, had "denied summarily" the defense motion for remittitur. Accordingly, the court of appeals "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*." *Id.* See also *Medical Mut. Liab. Ins. Soc. V. B. Dixon Evander & Assocs.*, No. 1752, 1992 Md. App. LEXIS 144 (Md.Ct. Spec. App. July 13, 1992) (vacating punitive damages and remanding based in part on lower court's failure to record its findings as to the propriety of the award).

In each of these cases, the appellate court overturned an award of punitive damages and remanded for the trial court to provide defendants with the procedural protections mandated by the Due Process Clause, protections that had been eviscerated by the trial courts' summary consideration and rejection of the defendants' claims. In this case, by contrast, the West Virginia Supreme Court affirmed the judgment and award of punitive damages even though the trial court had summarily rejected TXO's challenge to the punitive damages award without, conducting any sort of analysis. The West Virginia trial court's summary approval of the $10 million punitive award is indistinguishable from the decisions of the other trial courts found inadequate by the Eleventh and Eighth Circuits. Review by this Court is clearly warranted to resolve the existing conflict among the lower courts concerning precisely what is required by *Haslip*.

b. Additionally, TXO was deprived of due process at the appellate level. The West Virginia Supreme Court addressed neither the jury instructions nor the nonexistent review by the trial court. Instead, turning its back on the appellate standards articulated in its *Garnes* decision, the West Virginia court formulated and applied a "really mean"/"really stupid" defendant test in lieu of the type of "detailed substantive standards" approved in *Haslip*.[7] 111 S.Ct. at 1045. Setting forth "broad, general guidelines" for future application, App., *infra*, 35a, the court held that the outer limit for punitive damages imposed on "really stupid" defendants is roughly set by a five-to-one ratio, whereas punitive damages imposed on "really mean" defendants are constitutional no matter what their relationship to the

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7. Also representative of the cursory "review" performed by the West Virginia Supreme Court is the court's statement that "because [TXO] and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur." App., *infra*, 7a.

plaintiffs' actual injury. App., *infra*, 38a-39a.

This wholly arbitrary "test" [8] does not comport with due process. Rather, it invites trial and appellate courts to evaluate subjectively a defendant's acts as either mean or stupid,[9] an endeavor utterly inconsistent with this Court's emphasis on meaningful safeguards to prevent excessive punitive damage awards. See *Haslip*, 111 S. Ct. at 1046 (under Alabama's punitive damages procedure, award "did not lack objective criteria"). This subjective and standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion." *Id.* at 1045.

It is well established that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio V. Pennsylvania*, 382 U.S. 399, 402-03 (1966). No such legally fixed standards inhere in the newly minted "really mean"/"really stupid" defendant test. A defendant thus has no indication of what sort of behavior may arbitrarily be labeled as "really mean," a characterization that will unconstitutionally result in a punitive award that is virtually unlimited.

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8. As the West Virginia Supreme Court itself admitted, it is "difficult to distinguish" between "really mean" and "really stupid" defendants subject to punitive damages awards. App., *infra*, 36a n.11. These inherently subjective categories clearly provide no legitimate basis for restricting damages to five times the compensatory award in one case, but permitting an effectively boundless punitive award in the other.

9. Two justices of the West Virginia Supreme Court recognized the subjective nature of the "really mean"/"really stupid" test, and concurred separately to disassociate themselves from that "ridiculous categorization." App., *infra*, 53a-54a.

While the court in this case has adopted an extreme and indefensible interpretation of what *Haslip* permits and requires with respect to excessiveness of punitive awards, the problem of deciding what *Haslip* means is widespread among the lower courts, both state and federal. The results in scores of cases purporting to apply *Haslip* are deeply troubling. The excessive punitive damages awards that alarmed this Court, see *Browning-Ferris Indus. V. Kelco Disposal, Inc.*, 492 U.S. 257, 280-81, 282 (1989) (Brennan, J., joined by Marshall, J., concurring) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. V. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment); *City of Newport V. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Brennan, J., joined by Marshall, J., and Steven, J., dissenting), continue virtually unabated. [10] It is disconcerting that many lower courts have interpreted *Haslip* as providing blanket approval of nearly every punitive damages award and scheme.[11]

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10. *See, e.g., Glasscock V. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages $317,625, punitive damages $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Oberg V. Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (Jury awarded $919,391 in compensatory damages and $5 million in punitive damages. Compensatory damages were reduced by 20% based on comparative fault, but punitive award left unchanged.), *review granted*, 822 P.2d 1194 (Or. 1991). Even where remittitur has been ordered, punitive awards often remain enormous. *See, e.g., General Motors Corp. V. Johnston*, 592 S. 2d 1054 (Ala. 1992) (compensatory damages of $75,000, punitive damages of $7.5 million as remitted); *Burke V. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (compensatory damages of $390,000, punitive damages of $28 million as remitted).

11. *See, e.g., Coyne V. Allstate Ins. Co.*, 771 F. Supp. 673, 680-81 (E.D. Pa. 1991) (stating that Pennsylvania appellate courts provide the sort of "additional check on the . . . trial court's discretion" found crucial

These cases nod at, rather than heed, the message of *Haslip* that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury." *id.* at 1043, are critical in ensuring that a punitive damages award falls on the acceptable side of a constitutional dividing line. A punitive damages award made with "unlimited jury discretion --or unlimited judicial discretion for that matter," *id.*, must indisputably fall "into the area of constitutional impropriety." *Id.* at 1046. If the intention of the Court in *Haslip* was to establish that all courts must give serious content to the Due Process Clause when approving punitive awards, that purpose has not been achieved. Accordingly, the Court should grant review in this case to make plain that *Haslip* and the Due Process Clause require genuine constraints on jury and judicial discretion, and that the vague, newly invented "test" for punitive damages awards announced by the West Virginia Supreme Court in this case provides no such constraints.

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in *Haslip* even though the standards applied are abuse of discretion or the reviewing court's determination of excessiveness); *Commonwealth Lloyd's Ins. Co. V. Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992) (affirming $2 million punitive damages award based solely on adequacy of jury instruction, without requiring trial court review or conducting appellate review of the factors given to the jury), *writ of error filed* April 22, 1992; *Wolf V. Goodyear Tire & Rubber Co.*, 808 W.W.2d 868 (Mo. Ct. App. 1991) (holding Missouri procedure constitutional under *Haslip* although review for "excessiveness" conducted without articulated standards); *Oberg V. Honda Motor Co.*, *supra* note 10 (approving Oregon procedure under *Haslip* notwithstanding the state constitution permits reversal of jury awards of punitive damages only when the reviewing court finds a lack of *any* evidence supporting the award); *K-Mart Corp. V. Pearson*, 818 S.W.2d 410, 417 (Tex. Ct. App 1991) (intermediate appellate court concluded without analysis that "the trial court's instruction did not give the jury unlimited discretion" under *Haslip*, and "found [the punitive damages award] to be reasonable").

2. Even at first blush, the wide 526-to-one ratio in this case, which involved no personal injury of any sort, must immediately "jar one's constitutional sensibilities." *Id.* at 1043. In *Haslip*, where the ratio of punitive to compensatory damages was four to one, this Court stated that the "monetary comparison[] [was] wide," and might be "close to the line" of constitutional acceptability. *Id.* at 1046. This case, where the punitive damages are 526 times greater than the compensatory damages, is unquestionably out of bounds. In a case involving an alleged business tort, where no actual damages to the property right at issue were found,[12] a $10 million punitive damages award can scarcely be said to bear anything remotely approaching a "rational" relationship to the underlying $19,000 award. 111 S.Ct. at 1045-46. Moreover, it stretches credulity to believe that an award of $10 million is required to deter TXO or other companies from taking similar actions in the future. While some state and federal courts have reached precisely that conclusion in holding *less* excessive awards to be unconstitutionally disproportionate, other courts have, like West Virginia, interpreted *Haslip* to allow virtually limitless punitive damages.[13] The conflicting decisions highlight the need for this Court's review.

Alexander & Alexander, Inc. V. B. Dixon Evander & Associates, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992), is directly inconsistent with the West Virginia court's decision. There, an insurance agency and its agent were held liable for conspiracy and tortious interference with contracts held by the plaintiff, a self-employed insurance agent. The jury awarded $250,000

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12. The "compensatory" award consisted of only the attorneys' fees expended by respondents in defending against TXO's declaratory judgment action. *See* App., *infra*, 20a-21a.

13. *See supra* note 10.

in compensatory damages and $40 million in punitive damages, a ratio of 160 to one. Although the trial court found the punitive damages award to be excessive, and remitted it to $12.5 million, 596 A.2d at 704, the Maryland Court of Special Appeals vacated that award and remanded for a new trial on punitive damages. The court found the punitive award -- which as remitted was still 50 times the compensatory award -- unconstitutional under *Haslip*:

> Not only is the $12.5 million allowed by the [trial] court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to [plaintiff], representing nearly fifty times the essentially liquidated compensatory damage . . . . If the $840,000 awarded in *Haslip* came "close to the line" in terms of the actual loss suffered, this surely crosses that line.

596 A.2d at 710-11. Accord, *Medical Mut. Liab. Ins. Soc. V. B. Dixon Evander & Assocs., supra* (Same underlying facts as in *Alexander & Alexander*, with compensatory damages of $1,725,000. Punitive damages award of $7 million vacated and remanded for retrial).

Importantly, in reversing punitive damages awards as unconstitutionally excessive, *Alexander & Alexander* and *Medical Mutual* both emphasized that the harm arose out of a business tort, not involving loss of life or limb or threat to public health and safety. Thus, the court in *Alexander & Alexander* noted the "[t]his was, at bottom, a commercial dispute between two business competitors." 596 A.2d at 710. A different panel of that court similarly found that the "commercial dispute that triggered the awards of punitive damages was not 'very high on the scale of reprehensibility.'" *Medical Mutual*, 1992 Md. App. LEXIS 144 at *49 (quoting *Alexander & Alexander*).

That characterization, of course, applies equally to the instant case. This case involves slander of title to property; TXO did not "endanger the public health or safety [and] its conduct was not life-threatening to anyone." *Alexander & Alexander*, 596 A.2d at 711. Thus, even a ratio far lower than 526 to one is inconsistent with constitutional norms. The approval of this award by the West Virginia Supreme Court is simply indefensible.

Even where the underlying conduct has involved egregious personal injuries or public safety risks, court have found awards in ratios much smaller than the 526-to-one ratio here to be excessive. In *Mason V. Texaco, Inc.*, 948 F.2d 1546 (10 Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), for example, the jury awarded a total of $9,025,000 in compensatory damages and $25 million in punitive damages against the defendant, a producer of a carcinogenic substance that caused the plaintiff to develop and eventually die from leukemia. The jury found that the defendant knew or should have known of the dangers, and that it was wholly at fault for its negligent failure to ensure adequate warnings. The court of appeals found that the $25 million punitive award, 2.77 times larger than the compensatory award, was so excessive as to "shock the judicial conscience." *Id.* at 1561. In so finding, the court found fault with the fact that the "staggering sum" of $25 million bore "no necessary relation to the actual harm caused." *Id.* (quoting *Gertz V. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The court remanded with directions to enter remittitur to one-half the award, $12,500,000. *Id.*[14]

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14. *General Motors Corp. V. Johnston, supra* note 10, was a product liability and wrongful death case brought when a defective engine in a brand-new Chevrolet truck stalled in an intersection, and a seven-year-old passenger was killed in the resulting collision. The evidence showed that General Motors knew of the defect, but did not notify any

Haslip has unquestionably received mixed reactions by the lower courts. It has rightly been interpreted by some to place meaningful limits on the relationship between punitive and compensatory awards. It also has been interpreted to permit virtually limitless punitive awards. In sum, the issue has been allowed to percolate long enough in the lower courts. This case represents an extraordinary example of an overly lenient approach to excessiveness review and therefore provides an excellent vehicle for the Court to give further guidance on the precise meaning of its holding in *Haslip*.

3. In *James B. Beam Distilling Co. V. Georgia*, 111 S. Ct. 2439 (1991), this Court held that a newly announced rule of federal law may not be applied in a "selectively prospective" fashion. In other words, it is no longer permissible to extend the benefits of a newly declared federal rule to the litigants in the case announcing the rule, but not to those whose cases arose on facts predating the pronouncement. Rather, under such circumstances, the rule must be applied retroactively. *Id.* at 2448. The West Virginia Supreme Court's decision in this case is contrary to that principle. This Court should grant review to clarify that the holding in *James Beam* applies to a state court insofar as the state court is interpreting and applying federal law.

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of its customers in order to avoid expending the substantial sums necessary to recall and replace the defective part. The jury awarded $15 million in punitive damages and $75,000 in compensatory damages, a ratio of 200 to one. *Id.* at 1057. The awards were reviewed and approved by the trial court in accord with the Alabama standards validated in *Haslip*. The trial court could "find no reported decision in Alabama where a defendant's conduct even approached the degree of reprehensibility of Defendant General Motors' conduct in this case." *Id.* at 1061. Yet, upon review, the Alabama Supreme Court held that a remittitur to one-half the punitive award, $7.5 million, was required, *id.* at 1064, because punitive damages "should not exceed an amount that will accomplish society's goals of punishment and deterrence." *Id.* at 1063.

In *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court first analyzed the West Virginia procedure for awarding punitive damages in light of this Court's decision in *Haslip*. Finding that procedure to inadequate under federal law as enunciated in *Haslip*, the court announced new procedural guidelines to bring West Virginia's punitive damages scheme into compliance with federal law. 413 S.E.2d at 908. The litigants before the court in *Garnes* had not had the protection of those guidelines: accordingly, the West Virginia court remanded that case for a new trial to be conducted under the new federal constitutional requirements it had articulated. *Id.* at 910-11.

In this case, as well, TXO was not protected by the procedural guidelines held to be constitutionally required in *Garnes*. Yet, the West Virginia Supreme Court did not remand the case as it did in *Garnes*. The result of the application of federal due process law to TXO in the West Virginia Supreme Court was thus wholly at odds with what would have happened in a federal court.

This Court's decision in *Felder V. Casey*, 487 U.S. 131 (1988), indicates that the Constitution forbids this result, and requires state courts to apply the principles of *James Beam* to state decisions announcing or implementing new rules of federal law. In *Felder V. Casey*, which involved a federal civil rights action under 42 U.S.C. § 1983, the government defendants asserted that the suit could not be entertained because the plaintiff had failed to comply with Wisconsin's notice-of-claim statute. 487 U.S. at 135-36. That statute provided that no action might be brought against any state officer unless the claimant had provided, within 120 days of the alleged injury, written notice of the claim and the relief sought. *Id.* at 136-37. On appeal, the Wisconsin Supreme Court agreed, and the case was dismissed. *Id.* at 137-38.

This Court reversed. Notwithstanding that "States may establish the rules of procedure governing litigation in their own courts," a "federal right cannot be defeated by the forms of local practice.'" *Id.* at 138 (quoting *Brown V. Western Ry.*, 338 U.S. 294,296 (1949)). The Court concluded that because enforcement of the provision "will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal coūrt," the notice-of-claim provision was unconstitutional. *Id.* at 138-151.

The same reasoning must undermine the West Virginia Supreme Court's decision in this case that the procedural safeguards established as a matter of federal constitutional law in *Garnes* need not be retroactively applied. As *Felder* illustrates, it is impermissible for state procedural rules to burden a litigant's federal right. Surely the constitutional infirmity is even clearer where a state court's concern with judicial economy results in such a burden. See App., *infra*, 32a ("TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in . . . *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial."). The West Virginia court's analysis cannot be reconciled with *James Beam* and *Felder*, and certiorari should be granted in order for this Court to make clear that the holding of *James Beam* is fully applicable in the state courts.

Moreover, at least one court has already taken a conflicting view of the mandated course for a state court where it has applied a new federal-law ruling to the litigants before it. In *Seyller V. Pierce & Co.*, 816 S.W.2d 577 (Ark. 1991), a supplier wishing to impose a materialman's lien for which he had not given prior notice invoked

Arkansas's "commercial construction" exception to the statutory notice requirement for such a lien. The Arkansas Supreme Court had "recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds." *Id.* at 580 (citing *Urrey Ceramic Tile Co. V. Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991)). The court held that it was required, as a threshold matter, to "decide whether at apply *Urrey* retroactively to this case which was pending before us when *Urrey* was decided." *Id.* The Arkansas court recognized an obligation under *James Beam* that, having "applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or *res judicata*." *Id.*[15]

This Court should thus grant review in order to prevent an unconstitutional rift between state and federal courts in their approaches to retroactive application of rulings on federal law. As the decision of the Arkansas Supreme Court in *Seyller* shows, review is also merited to prevent such a rift among the state courts.

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15. The Arkansas court found, however, that the case before it differed from *James Beam* because "appellants [were] barred by the procedural requirement of preserving an issue in the trial court for [Supreme Court] review." *Seyller V. Pierce & Co.*, 816 S.W.2d 577, 580 (Ark. 1991). It was thus on the basis that there was a procedural bar that the Arkansas court held it need not apply its earlier decision. *Id.* at 580-81. Here, of course, there is no procedural bar. TXO argued in its motion for judgment *n.o.v.* that it had been denied due process because of the absence of meaningful standards for the jury and the trial court. App., *infra*,56a-69a. On appeal, TXO made the same argument to the West Virginia Supreme Court, which determined that the case need not be remanded. App., *infra*, 32a-33a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1992

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APPENDIX B

IN THE COURT OF APPEALS FOR THE
SIXTH JUDICIAL DISTRICT OF TEXAS
AT TEXARKANA

NO. 06-90-00014-CV
FIBREBOARD CORPORATION, et al,
Appellants,
V. (CONSOLIDATED)
REUBEN S. POOL, et al,
Appellees.

NO. 06-90-00022-CV
FIBREBOARD CORPORATION, et al,
Appellants,
V. (CONSOLIDATED)
LESSIE L. WILLIAMS, et al,
Appellees.

BRIEF OF APPELLEES

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT
COURT OF RUSK COUNTY, TEXAS
THE HONORABLE DONALD R. ROSS,
JUDGE PRESIDING

PAUL L. SADLER
REX HOUSTON

WELLBORN, HOUSTON, ADKISON
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ATTORNEYS FOR APPELLEES

INTERESTED PARTIES

Plaintiffs/Appellees:

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Charles W. Strong
Nancy B. Strong
Thomas R. Sledge
Betty J. Sledge
Robbie A. Freeman
Ollie Freeman
Donna Freeman
Lessie L. Williams
Ralph E. Williams
Robert E. Williams
Carrol A. Purdy
Murry W. Williams
Cindy L. Powdrill
Bobbie S. Phillips
Emory G. L. Williams
Patsy R. Fountain

Defendants/Appellants

The Celotex Corporation
Fibreboard Corporation
Owens-Illinois, Inc.
The Flintkote Company
H.K. Porter Company, Inc.
Garlock, Inc.

REPLY POINTS XXI, XXII:

THE AWARDING OF PUNITIVE DAMAGES, UNDER TEXAS LAW, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR THE DUE PROCESS CLAUSE OF SECTION 19, ARTICLE I, OF THE TEXAS CONSTITUTION. (Reply to Points of Error: Owens-Illinois, XXI, XXII; Celotex, XIX, XX; Fibreboard, VIII; Flintkote, VIII.)

REPLY POINT XXIII:

TEXAS COMMON LAW TRADITIONALLY ALLOWS FOR THE RECOVERY OF PUNITIVE DAMAGES WHEN THE CONDUCT OF THE DEFENDANT IS INTENTIONAL, WILLFUL, OR WITH A CALLOUS OR HEEDLESS DISREGARD FOR THE SAFETY OF OTHERS OR GROSSLY NEGLIGENT. (Reply to Owens-Illinois Point of Error XXIII.)

All of the constitutional arguments presented by these defendants in this appeal have been previously decided adverse to their position by the Federal Court of Appeals, Fifth Circuit. *Jackson v. John-Manville Sales Corp.* 727 F.2d 506; *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. en banc 1985); 781 F.2d 394 (5th Cir. 1986); *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036 (5th Cir. 1985); *Aguirre v. Armstrong World Industries, Inc.*, No. 88-7036, May 25, 1990; *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990).

The right of plaintiffs to recover punitive damages in the context of "mass asbestos litigation" has been affirmed by the Fifth Circuit in the cases of *Jackson*, 727 F.2d 506, *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. 1985), *Hansen*, 734 F.2d 1036 (5th Cir. 1985), and *King*, 906 F.2d 1022, (5th Cir. 1990). The Fifth Circuit, in deciding a Texas diversity case involving asbestos, wrote:

> . . .*Texas law does not preclude*, but, in fact, apparently grants the right to punitive damages awarded in favor of products liability plaintiffs, *even in context of mass asbestos litigation with potential for multiple* punitive damages awards against a defendant. *Hansen*, 734 F.2d 1036, citing Art. 16, § 26, Vernon's Ann. Texas Const.

Nevertheless, the defendants continue to urge a due process argument citing a District Court opinion in New Jersey, *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989). The defendants' argument appears to be based on a substantive component of due process, as opposed to procedural due process guarantees. Obviously, the requirements of procedural due process, i.e., notice of claim, right to confront and cross-examine witnesses, right to be heard at a meaningful time and manner, are satisfied by the complete evidentiary trial. Substantive due process essentially requires that any judicial proceeding be fundamentally fair.

Unlike New Jersey and apparently some other state, Texas common law provides for *fundamental fairness and safeguards* in the award of punitive damages. Texas law requires that punitive damages must bear a *reasonable proportion* to actual damages awarded. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). In addition, Texas

law requires the District Court in reviewing *excessiveness* of the amount of punitive damages awarded to consider the following factors: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoers; 4) the situation and sensibilities of the parties; and 5) the extent to which the defendant's conduct offends the public sense of justice and propriety. *Maxey v. Freightliner Corp.* 665 F.2d 1367 (5th Cir. 1984) at 1377; *Alamo National Bank v. Kraus*, 616 S.w.2d 908 (Tex. 1981). The very purpose of these rules and guidelines is to serve as a gauge for the Court in determining the effect of bias, prejudice and passion on the jury and, thus, the fundamental fairness of the process. *Nabours v. Longview Savings & Loan Assoc.*, 28 S.Ct.J. 571 (Tex. 1985); *Nolan v. Bettis*, 577 S.W.2d 551 (Tex. Civ. App.-Austin, 1979, writ ref'd, n.r.e.).

In a United States Supreme Court recent opinion on punitive damages, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989) the Court discusses due process requirements of the Fourteenth Amendment. The Court states:

> The parties agree that due process imposes *some* limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But the Petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek further due process protections, addressed directly to the size of the damages award . . . but we have never addressed the precise question presented here: Whether due

> process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.

Id. at 2921. The Court states that Petitioners failed to properly raise that issue. However, the elements of concern considered by the Court are all protected under current Texas law. Under Texas law, as previously demonstrated, the jury does not have undue discretion but, rather, any award is carefully scrutinized by the trial judge and the size of the award must comply with the "reasonable relation" rule and be reviewed according to the *Alamo*, 616 S.W.2d 908, factors.

In the present case, the defendants do not urge that this award is excessive or violative of any of the Texas guidelines. They do not claim that the punitive award was the product of bias or passion, or that the award was the product of an unfair proceeding. The simple fact is that Texas law provides the defendants all of the substantive and procedural protection of the Fourteenth Amendment.

The Texas procedures give strict guidelines to be followed by the Trial Court and Appellate Courts in reviewing the amount awarded by a jury in punitive damages. This jury awarded punitive damages for conduct related to specific damages sustained by specific plaintiffs. The defendants did not offer evidence of the national scope of the asbestos problem, nor does state or federal law allow one jury to decide punishment for "all of the injured plaintiffs, in the nation." If, in fact, this jury would have been allowed to award punitive damages for the injury to 70,000 plaintiffs, these same defendants would have complained that the award should not be allowed because it is not "reasonable in relation to actual damages found" for all 70,000 plaintiffs. The safeguard in the Texas system is that

a plaintiff must prove and recover a specific amount of actual damages for *his* injuries and the punitive damages *must* be "reasonably proportionate" to those damages. A defendant that has caused death and disease in thousands of workers should not be allowed to choose the award of punitive damages it desires to pay one plaintiff and foreclose the rights of all other plaintiffs guaranteed by the Texas Constitution. Finally, the defendants urge that, for some of them, the conduct complained of stopped years ago and, therefore, the deterrence purpose of punitive damages has been served. Such an argument suggests that a company can engage in grossly negligent conduct killing thousands of people, but avoid punishment simply by stopping the conduct or by killing too many people. This very shallow argument has far reaching consequences for Texas law. For example, a company that hires a driver with a known record of drunkenness causing accidents, could avoid punishment and, thus, deterrence, by simply firing the driver before punitive damages are rendered and claim no deterrence was necessary. The policy of deterrence underlying punitive damages or punishment is not solely for the individual or entity engaging in the conduct but, rather, to prevent others from engaging in the same or similar conduct. For purely policy reasons concerning the safety of the public, a company that engages in conduct causing death and disease in 70,000 people should not be able to claim avoidance of punishment and deterrence because one plaintiff received punitive damages for *his injuries*. The argument of the defendants make a mockery of deterrence, fairness and justice for innocent and unknowing workers. For these reasons, Texas law has always recognized the right of an individual to seek punitive damages when the conduct of the defendant is grossly negligent. Texas law provides fundamental fairness in the adjudication of a claim for punitive damages and safeguards concerning the amount of damages awarded. No

violation of the Constitutions of the United States or Texas have been demonstrated and these points must be denied.

REPLY POINT XXIV:

THE PUNITIVE DAMAGE AWARD DOES NOT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE TEXAS CONSTITUTION. (Response to Celotex Point of Error XXI.)

Celotex cites to this Court, the case of *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980), for authority and a test for determining whether a civil penalty is unconstitutional. Unfortunately, Celotex does not provide the entire test provided by the Court. When the entire test of *Pennington* is considered, the punitive damage award of this jury and Texas law concerning punitive damages, clearly do not violate Art. I §§ 13 and 19.

In *Pennington*, the Texas Supreme Court stated:

> A primary consideration in determining whether a fine is excessive, is whether it is *fixed with reference* to the object it is to accomplish . . . (The trebling provision) indicates an attempt by the legislature to proportion damages *according to the seriousness of the wrong* . . . the *defendant's culpability* or lack thereof is an important consideration.

Once again, Celotex is not urging before this Court that the jury award of punitive damages *in this case* was excessive. Furthermore, Texas law concerning punitive damages, as previously demonstrated, contains the very requirements of the *Pennington* case. Punitive damages must

be *reasonable in relation* to actual damages awarded. The District Court must consider 1) *the nature of the wrong*; 2) the character of the conduct involved; 3) the degree of *culpability of the wrongdoer*; 4) the situation and sensibilities of the parties; and 5) the extent to which the defendant's conduct *offends the public's sense of justice and propriety*. *Alamo National Bank v. Kraus*, 616 S.W.2d 908; *Nabours v. Longview Savings & Loan Assoc.*, 28 S.Ct.J. 571.

These factors are exactly the same factors the Court considered in *Pennington* and found that the Deceptive Trade Practices Act was not unconstitutional. The Court states:

> The declaration in the Constitution that fines shall not be excessive makes it a question for the Court to decide under the facts of *each particular case*. (authorities omitted) (*Pennington v. Singleton*, 606 S.W.2d at 690.)
>
> A fine is not unconstitutionally excessive and the Courts will not override the legislature's discretion, except in extraordinary cases, where it becomes so *manifestly violative* of the constitutional inhibition as to *shock the sense of mankind*.

The damages awarded by this specific jury for these specific injuries is not alleged by any defendant as so excessive to "shock the sense of mankind." The Court, in *Pennington*, found the recovery increased in a *fixed proportion* to his *actual loss*. This indicated an attempt to proportion damages according to the "seriousness of the wrong." Here, the punitive damages awarded were required to be "reasonable in relation" to actual damages found.

Nabours, supra. The trial court, in reviewing the award, had to consider the *Alamo National Bank*, 616 S.W.2d 908, factors which specifically include the "seriousness of the wrong" and the "degree of culpability." Finally, as in *Pennington*, 606 S.W.2d at 691, the prohibited conduct, failing to warn, was described with "reasonable certainty, furthering the policy of fairness to the defendant."

Consequently, this Court must overrule this point of error.

REPLY POINT XXV.

THE TRIAL COURT PROPERLY SUBMITTED THE JURY QUESTIONS CONCERNING LIABILITY AND COMPARATIVE CAUSATION. (Reply to Celotex Point of Error, XI.)

Defendants complain with regard to the manner of submission of Jury Question Nos. 2 through 13 contained in the verdict forms of all five plaintiffs. For the Court's convenience, these verdict forms are set forth in the record, as follows:

1) George William - Williams Tr., vol. 20 at 2404-2451;

2) Donald Freeman - Pool Tr., vol. 36 at 4392-4437;

3) Thomas Sledge - Pool Tr., vol. 36 at 4438-4485;

4) Reuben Pool - Pool Tr., vol. 36 at 4486-4531; and

5) Charles Strong - Pool Tr., vol. 37 at 4534-4579.

The defendants urge that the trial court's manner of submission somehow violates the Texas Supreme Court's holding in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). As defendants point out, the Texas Supreme Court did suggest a general form to be adapted to the specific allegations of each case--for use in the allocation and determination of each party's percentage of comparative causation. *Id.* at 427, n.8. Contrary to the assertions of defendants, the comparative causation question (Question No. 16) in the verdict form of *each* plaintiff was submitted to the jury in the manner suggested by *Duncan*. *See*, Williams Tr., vol. 20 at 2426-2428; Pool Tr., vol. 36 at 4423-4426, 4470-4473, 4517-4520; Pool Tr., vol. 37 at 4565-4568. In fact, contrary to the recommendation by *Duncan*, the plaintiff's name in each of the five comparative causation questions was listed *first*, not last. In light of the foregoing, or allocate causation against other manufacturers. The defendants failed in their burden of proof and the award of the jury coincides with the testimony elicited.

REPLY POINT XXVIII:

THE TRIAL COURT CORRECTLY SUBMITTED JURY QUESTIONS ON THE AMOUNT OF PUNITIVE DAMAGES TO BE AWARDED CONDITIONED FIRST ON A FINDING OF REQUISITE MENTAL STATE FOR ASSESSMENT OF PUNITIVE DAMAGES. (Reply to Celotex Point of Error, XVIII.)

REPLY POINT XXIX:

THE TRIAL COURT PROPERLY SUBMITTED THE EXEMPLARY DAMAGE JURY QUESTIONS. (Reply to Point of Error: Garlock, IV, Flintkote, VII.)

In reviewing this argument of Celotex, this Court is, again, guided by an abuse of discretion standard of review. Furthermore, only a *direct comment* on the weight of the evidence presents reversible error. *Briseno v. Martin*, 561 S.w.2d 794, 796-797 (Tex. 1977). A direct comment on the wright of the evidence is one which suggests to the jury the trial judge's opinion concerning the matter about which the jury is asked. *City of Amarillo v. Langley*, 651 S.W.2d 906, 915 (Tex. App.-1983, no writ). The validity of an objection to any portion of a charge requires an examination of the charge in its entirety. *Pickens v. Harrison*, 252 S.W.2d 575 (Tex. 1952); *Texas Employers' Ins. Ass'n. v. McKay*, 210 S.W.2d 147 (Tex. 1948).

The argument of Celotex completely ignores the charge. The very first question in the charge for each of the plaintiffs asks if they sustained an asbestos-related injury. The question complained of by Celotex is Question No. 20 and is conditionally submitted on a finding first by the jury if the defendants *acted* willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the plaintiffs. Only if the jury answered "yes" to Question 19, finding such conduct, would the jury answer what sum of money, *if any* should be assessed as exemplary damages. Williams Tr., vol. 20 at 2447-2449; Pool Tr., vol. 36 at 4433-3335, 4479-4481, 4526-4528; Pool Tr. vol. 37 at 4574-4576.

The jury was not asked to award punitive damages to compensate the plaintiffs but, rather, after a specific finding concerning the conduct of the defendants, to award an amount, if any, as exemplary damages. The language of the series of issues, and the instruction of the court, properly focused the attention of the jury on the conduct of the defendant and Texas law concerning exemplary damages.

The questions does not assume injuries to the plaintiffs--the jury had already found an injury to the plaintiffs. Furthermore, the issue does not in any manner indicate a *direct comment* or opinion of the trial judge. Therefore, this point of error should be overruled.

Defendants allege that the submission of the exemplary damage questions contained within the various verdict forms "completely blurs the distinctions between the basis for actual damages . . .and the basis for exemplary damages . . . "(Brief of Appellant, Garlock, Inc., at 23) and "erroneously transformed punitive damages into a cumulative form of compensatory damages" (Brief of Appellant, The Flintkote Company, at 38). Nothing could be further from the truth. *Each* of these jury questions contained the following definition:

> "'**EXEMPLARY DAMAGES**' means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages."

Williams Tr., vol. 20 at 2449; Pool Tr., vol 36 at 4435, 4481, 4528; Pool Tr., vol. 37 at 4576.

This correct, properly--worded definition clearly outlines the purposes which support and justify the imposition of exemplary damages--deterrence (". . .as an example to

others. . .") and punishment (". . .as a penalty or by way of punishment . . ."). This definition if precisely the one suggested by **3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES** (Second Edition, 1990) Sec. 80.06. Contrary to the tenuous arguments of defendants, the exemplary damage definition plainly pointed out to the jury that any amount awarded as exemplary damages would be " . . . *in addition to any amount you may have found as actual damages*." Consequently, there was no "erroneous standard" presented to the jury, nor was there any violation of **TEX. R. CIV. P. 277**.

In *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App.-Corpus Christi 1986), *vacated and remanded*, 754 S.W.2d 646 (Tex. 1988), the appellate court addressed a jury question" which asked the jury to find what sum of money, if any, should be assessed as exemplary damages against [the defendant] *for the death of* [the decedent]." *Id.*, at 334 (emphasis by the court). The Court of Appeals stated "[e]ven though we find that the issue in question might have been worded differently, *it was not improper*." *Id.* (emphasis added). Plaintiffs point out, however, that the *Durrill* case was subsequently settled, which vacated the Court of Appeals' judgement and resulted in the remand of the case to the trial court. *Durrill v. Ford Motor Co.*, 754 S.W.2d 646 (Tex. 1988).

Additionally, defendants again attempt to mislead this Court by misstating the propositions and holdings of their allegedly supportive case law. For example, defendants cite *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex.Civ. App.-Beaumont 1978, writ ref'd n.r.e.), in support of the allegation that:

> ". . . this charge erroneously transformed punitive damages into a cumulative form

> of compensatory damages, thus inviting the jury to award damages a second time for injuries already considered under the heading of compensatory damages."

Brief of Appellant, The Flintkote Company, at 38-39.

French did not address, nor even mention, exemplary damages. Rather, the dispute in that case centered on the submission of a "physical impairment" actual damage element and a jury instruction concerning the *actual* damage issues. *French*, 567 S.W.2d at 606,608.

Defendants also cite *Briseno v. Martin*, 561 S.W.2d 794, 796-797 (Tex. 1977) as supportive authority. In *Briseno*, the argument was made that a jury question impermissibly commented on the weight of the evidence because it was not submitted conditionally upon a finding that the driver was reckless. *Id.* at 796. The Texas Supreme Court held that this jury question did comment on the weight of the evidence, *but* the comment was only incidental because, in the preceding question, the jury specifically found that the driver was reckless. *Id.* at 797. Plaintiffs have already shown that the exemplary damage jury questions were properly conditionally submitted upon the "state of mind" question immediately preceding each exemplary damage question. Therefore, per *Briseno*, the allegedly improper "comments on the weight of the evidence" cited by defendants herein constitute--at most--incidental comments and are *not* violative of **TEX. R. CIV. P. 277**.

Furthermore, not every comment--even a direct one--is a ground for reversal. The comment must also be one that probably caused the rendition of an improper verdict. *Alvarez v. Missouri-Kansas-Texas Railroad Co.*, 683 S.W.2d

375 (Tex. 1984), at 377; *Hirdler v. Boyd*,702 S.W.2d 727 (Tex. App. - San Antonio 1985, no writ), at 730. Even if this Court determines that the exemplary damage jury questions contained improper comments, the existence of such comments did *not* cause the rendition of improper verdicts in these actions. The correct definition of "exemplary damages" was included in each of the questions--this definition plainly stated the basis and purpose of exemplary damage awards; this definition also clearly emphasized that any amounts awarded as exemplary damages were *in addition to* the amounts awarded as actual damages. The jury understood the differences and voluntarily determined exemplary damages were justified.

APPENDIX C
NO. D-1376
IN THE SUPREME COURT OF TEXAS

NO. 06-90-00014-CV
FIBREBOARD CORPORATION, et al
Petitioners,
v. (CONSOLIDATED)
REUBEN S. POOL, et al,
Respondents.

NO. 06-90-00022-CV
FIBREBOARD CORPORATION, et al
Petitioners,
v. (CONSOLIDATED)
LESSIE L. WILLIAMS, et al,
Respondents.

BRIEF IN RESPONSE TO APPLICATIONS FOR WRIT OF ERROR

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III. THE COURT OF APPEALS PROPERLY AFFIRMED THE AWARD OF PUNITIVE DAMAGES AGAINST CELOTEX, OWEN-ILLINOIS, FIBREBOARD AND FLINTKOTE BECAUSE TEXAS LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR THE DUE PROCESS CLAUSE OF SECTION 19, ARTICLE I OF THE TEXAS CONSTITUTION. (Reply to Points of Error: Celotex V; Owens-Illinois III; Fibreboard I, III; Flintkote II.)

IV. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE PETITIONERS' COMPLAINT OF THE AWARD OF PUNITIVE DAMAGES AGAINST THE PETITIONERS BECAUSE THE PETITIONERS WAIVED ANY CHALLENGE TO THE AWARD BY FAILING TO OBJECT OR DEMONSTRATE THAT THE AWARD WAS EXCESSIVE. (Reply to Points of Error: Celotex V; Owens-Illinois III; Fibreboard I, III; Flintkote II.)

In consideration of the Petitioners' contentions concerning punitive damages, it must be noted that none of the Petitioners claimed before the Court of Appeals that the specific award of this jury was excessive in relation to the actual damages awarded these specific plaintiffs. Furthermore, none of the Petitioners asserted or claim that plaintiff does not have the right to recover punitive damages in a failure to warn product liability action where gross negligence is found by the jury. Consequently, for this

appellate review it must be admitted that the amount of the award of this jury as it relates to these specific plaintiffs was reasonable and is not excessive.

The Petitioners, Celotex, Owens-Illinois and Fibreboard, contend that the potential for multiple awards of punitive damages against them violates due process. The Petitioner, Flintkote, contends that the procedural rules and guidelines contained in Texas common law violate due process. Additionally, Petitioners, Flintkote and Fibreboard, complain that the award of punitive damages was improper because of evidentiary concerns or that the Court of Appeals did not fully review the evidence with respect to the Supreme Court guidelines for review of the amount of damages awarded.

A. *The Supreme Court Does Not Have Jurisdiction of the Punitive Damage Complaint.*

This Court, in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), clearly reaffirmed the long standing rule of appellate review of excessiveness of a punitive damage award. The Court stated:

> Whether the amount of damages awarded by the jury is excessive is a question of fact over which this Court has *no jurisdiction*.
>
> Whether the Court of Civil Appeals applied *an erroneous standard in determining the excessiveness of damages* presents a question of law within the jurisdiction of this Court.

Respondents would respectfully contend that absent a complaint in the Court of Appeals that the award of punitive damages was excessive, then any complaint related to the award which concerns the amount of damages awarded or the application or sufficiency of the guidelines for reviewing the award of punitive damages has been waived and this Court does not have jurisdiction to now consider either the award or the sufficiency of the guidelines to review an admitted reasonable award of punitive damages.

Clearly, a review of the Points of error raised before the Court of Appeals and assigned in the respective Motions for Rehearing, demonstrates that the Petitioners did not challenge and do not challenge the amount of the punitive damage award. Likewise, the Petitioner did not seek a remittitur of punitive damages. The Petitioners do not and did not challenge the right of the plaintiffs to recover punitive damages in a failure to warn action with a finding of gross negligence. Petitioners, Celotex and Owens-Illinois, do not now challenge the evidence or basis of the award of punitive damages. It is axiomatic that the Petitioners should not be allowed to challenge the sufficiency of the guidelines of review or the application of those guidelines if they fail to allege, complain or even attempt to demonstrate that the underlying award is, in fact, excessive.

The Petitioners cite as authority, the recent United States Supreme Court Opinion of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). Clearly, *Haslip* involved a due process challenge to a judgment awarding punitive damages following a complaint that the award was excessive. It was in context of that challenge that a review of the Alabama standards was made. Absent a challenge of the underlying award, there would have been no cause to review the Alabama procedures as they relate to a due process challenge. Therefore, this Court should deny the

Applications for Writ of Error as to these Points of Error because the Court lacks jurisdiction or because of waiver for failure to challenge the underlying award as excessive.

Since the amount or propriety of the award has not been challenged, the only constitutional questions presented are whether the potential for multiple awards violates due process or whether or not the Texas common law method of assessing punitive damages is per se unconstitutional and violates due process. Both of these issues have been previously reviewed and discarded by the United States Supreme Court and the Fifth Circuit Court of Appeals.

In fact, all of the constitutional arguments presented by these defendants have been previously decided adverse to their position by Federal Court of Appeals, Fifth Circuit and Petition for Writ of Certiorari denied by the United States Supreme Court. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506; *rehearing granted en banc, opinion withdrawn*, 750 F.2d 1314 (5th Cir. en banc 1985);781 F.2d 394 (5th Cir. 1986); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1985); *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256 (5th Cir. 1990); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991); *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), (see attached copy as Appendix 1).

B. *The Potential of Multiple Punitive Awards or the Existence of Multiple Punitive Awards Does Not Violate Due Process.*

The Petitioners assert that this precise constitutional argument has not been previously reviewed or considered. In fact, it has been considered many times by the Fifth Circuit Court of Appeals and has recently been specifically

refused by the United States Supreme Court by denying certiorari in *King*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991). (See Appendix 2 for a copy of the applicable portion of the Petition for Writ of Certiorari by Celotex in *King*, *Id.*) Additionally, it was specifically addressed, again, by the Fifth Circuit in *Glasscock*, *Id.* Opinion at 23.

The asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869. The full extent for the death and disease caused by the manufacturers of products containing asbestos such as these Petitioners was not known at that time by the plaintiff and has still not been fully realized. Only the Petitioners knew the extent of the exposure throughout this country and the thousands they voluntarily and knowingly exposed to asbestos.

The punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual form minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts," which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex, Owens-Illinois and Fibreboard urge that it is not this particular award that is objectionable but, rather, the combination of past awards the potential of future awards that violates due process. Thus, it argues, having one

punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after the defendant selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, the Petitioners would object that it violated the very Texas standards it complains of in this Application.

Interestingly, under this appellate record with the absence of a challenge that the award of this jury is excessive, Petitioners would have this Court overturn an award that has been admitted to be reasonable and based upon specific individual harm because another plaintiff in a different lawsuit with different injuries and damages was awarded punitive damages for his individual harm. Clearly, there is no principle of law that justifies that conclusion or action by this Court.

Not only does the Petitioners view of due process violate both due process and equal protection principles, it would completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, the defendant could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and

the extent to which the defendant's conduct offends the public sense of justice and propriety. Petitioners argue that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essence, their argument is that they injured and caused death in so many people that they should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease in 65,000 people. The conduct of the Petitioners consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff.

The simple fact is that the Petitioners could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of the jury was unjust because of prior awards.

By affidavit, post-trial, the Petitioners, Celotex and Owens-Illinois, demonstrated only that two prior punitive

damage awards had been paid. (Respondents have no way of determining the truth of the assertion.) This type of evidence has been rejected by the Second Circuit as failing to make an adequate record in the Trial Court to support a due process challenge. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990), *cert. denied*, 111 S.Ct. 297, 112 L.Ed.2d 250; *Racich v. Celotex Corp.*, 887 F.2d 393 (2nd Cir. 1989).

In *Johnson v. The Celotex Corporation*, 111 S.Ct. 297, Celotex and Owens-Illinois, appealed an adverse judgment presenting this precise argument. Celotex offered no evidence of the amount of punitive damages paid. However, Owens-Illinois advised the Court it had paid $554,194 in punitive damages. The Second Circuit wrote, "there has been insufficient proof to demonstrate and *unjust result* of multiple imposition of punitive damages for the same course of conduct." *Id.*, at 1287. The Court continues, stating, "The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process." *Id.*,at 1287, 1288. Such is the scenario now before this Court. The Petitioners have simply failed to maintain and present an adequate record that will support its due process arguments. Furthermore, the Petitioner, Fibreboard, has not demonstrated any award of punitive damages that it has paid.

This jury awarded punitive damages for conduct related to specific damages sustained by specific plaintiffs. The Petitioners did not offer any evidence of the national scope of the problem, nor does state or federal law allow one jury to decide punishment for "all of the injured plaintiffs in the nation." The safeguard in the common law system of assessing punitive damages is that a plaintiff must prove and

recover a specific amount of actual damages for *his* injuries and the punitive damages *must* be "reasonably proportionate" to those damages.

Finally, the Petitioners urge that, for some of them, the conduct complained of stopped years ago and, therefore, the deterrence purpose of punitive damages has been served. Such an argument suggests that a company can engage in grossly negligent conduct killing thousands of people, but avoid punishment simply by stopping the conduct or by killing too many people. This very shallow argument has far reaching consequences for Texas law. For example, a company that hires a driver with a known record of drunkenness causing accidents, could avoid punishment and, thus, deterrence, by firing the driver before punitive damages are rendered and claim no deterrence was necessary. The policy of deterrence underlying punitive damages or punishment is not solely for the individual or entity engaging in the conduct but, rather, to prevent others from engaging in the same or similar conduct. For purely policy reasons concerning the safety of the public, a company that engages in conduct causing death and disease in 70,000 people should not be able to claim avoidance of punishment and deterrence because one plaintiff received punitive damages for *his injuries*. The argument of the defendants makes a mockery of deterrence, fairness and justice for innocent and unknowing workers. For these reasons, Texas law has always recognized the right of an individual to seek punitive damages when the conduct of the defendant is grossly negligent. Texas law provides fundamental fairness in the adjudication of a claim for punitive damages and safeguards concerning the amount of damages awarded.

The Fifth Circuit recently denied these very same argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), stating:

Each of these plaintiffs also has a right to seek punitive damages for Celotex's willful and intentional failure to warn about the dangers of asbestos. *There is no principle in law limiting the recovery of punitive damages to the first claimant.* (*Glasscock*, at page 24.)

Clearly, no violation of the Constitutions of the United States or Texas has been demonstrated. This very argument has repeatedly been urged and denied in Federal Court and certiorari denied by the United States Supreme Court. Consequently, this Point of Error should be denied.

C. *Texas Law Provides Sufficient Due Process Safeguards for the Imposition of a Punitive Damage Award.*

Respondents would, again, respectfully urge that the failure of the Petitioners to challenge the award of punitive damages as excessive precludes consideration of this Court of a challenge to the sufficiency of those guidelines or their application to this award. Nevertheless, Respondents will demonstrate that Texas law has sufficient safeguards and provides for fundamental fairness.

The Texas common law method of assessing punitive damages has previously been reviewed by the Fifth Circuit Court of Appeals and the United States Supreme Court in the context of a due process challenge. In *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236, 114 L.Ed.428 (1991) (see attached Appendix 2 for applicable portions of Celotex Petition for Writ) and in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991), Slip Opinion at p. 25, Celotex's challenge to constitutionality of the Texas law was denied. Texas common law has embraced the traditional common law approach for assessment of punitive damages.

As the United States Supreme Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1990):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the Trial and Appellate Courts to ensure that it is reasonable . . .
>
> . . .Since every State and Federal Court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

In *Haslip*, the Supreme Court analyzed the procedural protections that safeguarded and guaranteed the due process rights of the defendant. These procedural protections included objective criteria for the imposition of punitive damages in the form of Trial Court instructions and jury findings, post-trial review by the Trial Court and appellate review of the excessiveness of the award.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v.*

Longview Savings & Loan Association, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, if the award is challenged for excessiveness, the Trial Court, and Appellate Court must review the award of the jury for excessiveness. In making that review, the Trial Court and the Appellate Court *must* consider at least the following factors: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoer; 4) the situation and sensibilities of the parties; and, 5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.*, at 910. In addition, this Trial Court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by some of the Petitioners. (Respondents have no way to verify the accuracy of the Petitioner's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

A complete review of this record demonstrates that the jury was given: 1) clear objective criteria for the imposition of punitive damages; 2) the full panoply of procedural protections; 3) instructions describing the purpose of punitive damages as punishment and deterrence; 4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was no compulsory; 5) the Trial Court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review including the Petitioners' claim of multiple prior punitive damage awards; 6) the Appellate Court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the

award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded these Petitioners.

The Petitioners imply that the Alabama system is a precise model which must be adhered to for due process. The Fifth Circuit has rejected that precise argument in *Glasscock v. Armstrong Cork Co.*, No. 90-4095, (5th Cir. October 24, 1991) at p. 30, wherein the Court stated:

> We get no indication from *Haslip* that the Court will scrutinize each State's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. *Texas meets those requirements.*

Clearly, Texas law provided for "fundamental fairness and safeguards in the award of punitive damages. The jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. Even though this specific award has not been challenged as excessive, the Trial Court and the Court of Appeals completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the Trial Court and the Appellate Court reviewed the claims of the Petitioners that previous awards should prohibit the imposition of this award.

Clearly, the lower Courts, The Federal Courts and the United States Supreme Court have recognized that the recovery of punitive damages ia na individual right and that the awards are based upon specific individual harm and conduct of the Petitioners as it relates to specific individual harm. Consequently, this Point of Error must be denied.

D. *The Court of Appeals Properly Applied Texas Law in Affirming the Award of Punitive Damages Against Fibreboard.* (Reply to Fibreboard Point of Error I)

Although Fibreboard describes this Point of Error as a misapplication of law, actually, Fibreboard is improperly attempting to raise a factual sufficiency argument in this Point of Error. Article V, Sec. 6 of the Texas Constitution establishes that the Supreme Court does not have jurisdiction to consider Points of Error attacking the factual sufficiency of the evidence to sustain or overturn a fact finding. *Ames v. Ames*, 776 S.W.2d 154, 159 (Tex 1980); *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 253 (Tex. 1983). Throughout this Point of Error, Fibreboard does nothing more than weigh what it perceives to be conflicting evidence. Clearly, this is a factual sufficiency analysis and this Court should deny the Application for Writ of Error.

In spite of the holdings of the Texas Supreme Court, these Petitioners maintain that punitive damages can only be recovered where the plaintiff proves by direct evidence the defendant's subjective state of mind. The defendants continually attempt to eliminate the ability of a plaintiff to prove gross negligence by proof that "under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others." Clearly, under the evidence in this case, these defendants are guilty of gross negligence and conduct demonstrating a conscious and reckless disregard for the rights and safety of the consumers and users of their products.

In *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, (Tex 1985), the Texas Supreme Court unequivocally states that in order to recover punitive damages and sustain a finding of gross negligence, a plaintiff need not prove a

defendant's subjective state of mind by direct evidence. A plaintiff may prove the defendant's gross negligence by either proving:

1. the defendant had *actual subjective knowledge* that his conduct created an extreme degree of risk; *or*

2. by providing that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others.

Williams, 699 S.W.2d at 573.

As stated by the Texas Supreme Court, "thus, the test for gross negligence is both an objective and subjective test." The reason Texas law provides for this rule should be apparent. The plaintiff is not always capable of making the defendant tell the truth or admit knowledge of the risk. As the Supreme Court states, to require only *direct evidence* of a defendant's subjective state of mind would leave outrageous conduct unpunished. Therefore, "a mental state may be *inferred* from actions." *Williams*, 699 S.W.2d at 573. Clearly, in light of the evidence presented in this case, the jury could *infer* the mental state of these defendants. Clearly, under the evidence presented in this case, the conduct of the defendants was outrageous and should be punished.

The following evidence proves that under the surrounding circumstances, a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others:

1. Testimony of Dr. Joseph Wagoner (SF, vol. II, p. 127-208; Vol. III,p. 209-356.)

2. Testimony of other manufacturers concerning their knowledge of the risk (SF,vol. V, p. 671; vol. V,p. 714-759; vol. V, p. 760-766; vol. V p. 767-793; vol. V, p. 794; vol. VI, p. 887; vol. VI, p. 1033-1071.)

3. Cross-examination of Dr. Clark Cooper--a consultant to Fibreboard and an expert called by the defendants (SF, vol. XI, p. 1850-1976.)

4. Cross-examination of Edward Torbohn, an employee consultant of Fibreboard (SF, vol. XII, p. 2165-2178.)

5. Answers to Interrogatories and Requests for Admissions of these defendants (SF, vol. II, p. 70.)

This testimony unequivocally proves that a reasonable person, under the surrounding circumstances, would have realized their conduct created an extreme degree of risk to the safety of others.

1. *TESTIMONY OF DR. JOSEPH WAGONER.*

Dr. Joseph Wagoner is a professional epidemiologist and biostatistician. An epidemiologist is a person who specializes in the study of disease causes and their effects upon individuals and the public in general or isolated groups of the public. SF, vol II, p. 128. Dr. Wagoner's qualifications are unparalleled in this field. He received his

Doctorate from the Harvard University School of Public Health in Boston, Massachusetts. SF, vol. II,p. 128. He is a former Director of the Division of Field Studies and Clinical Investigations for the National Institute for Occupational Safety and Health Department of HEW at Cincinnati, Ohio. SF, vol. II, p. 128-129. He served as Chief of the Division of Surveillance, Hazard Evaluation and Field Studies for the Department of Health, Education and Welfare at Cincinnati, Ohio. He has served in numerous other capacities, including Senior Epidemiologist in the office of Director of the National Institute for Occupational Safety and Health. SF, vol. II, p. 129. He is currently a Fellow of the New York Academy of Sciences, SF, vol. II, p. 130.

Dr. Wagoner's testimony begins by identifying the known risks of exposure to asbestos in the products of the defendants. Incidentally, the defendants continually assert their products contained only "small amounts of asbestos, ranging from 5% to 20%." The fact is, that all products which contain asbestos are composed of similar amounts of asbestos, except some cements and tape, which contain as much as 90% to 100% asbestos. Therefore, the testimony of Dr. Wagoner, as he demonstrates, *is* discussing products containing "small amounts of asbestos" and the *necessary risks associated with the use of those products*.

Dr. Wagoner testified that by the 1920's, asbestos was recognized as a disease causing mineral and was causing the disease, asbestosis. SF, vol. II, p. 137. He established that the asbestos-related diseases included pleural disease, asbestosis, lung cancer, mesothelioma, cancers of the gastrointestinal tract, and heart disease. SF, vol. II, p. 138-140. He agrees with the estimation that *tens of thousands of workers will die* of asbestos-related cancer in the next half century. Furthermore, that 45% to 50% or nearly *half of all asbestos workers* will die of some form of cancer. In

addition to these workers, many of their family members, housewives and children, will die from inhaling asbestos from the work clothes of these men. SF, vol. II, p. 143-144. The dangers and risk of disease and death due to exposure to asbestos fibers released when the products are used, are very real dangers and supported by the published literature. SF, vol. II, p. 144.

Dr. Wagoner explained that between 1927 and 1930, it was established with a certainty that asbestos causes asbestosis. SF, vol. II, p. 146. For purposes of these plaintiffs, that was over 20 years before their initial exposure. Asbestosis is scarring of the lung tissue itself, resulting in damage to the small airways where the oxygen-gas exchange takes place. The disease is recognized as a progressive, irreversible disease, without cure. In its later stages, it requires oxygen support and, ultimately results in a suffocating death. Asbestos was suspected to cause lung cancer by 1935, and was known as a probable cause of lung cancer during the time frame of 1939 through 1948. SF, vol. II, p. 146. For purposes of these plaintiffs, that was approximately 2 to 15 years before their initial exposure. Asbestos was suspected to be a cause of mesothelioma by 1943. Sf, vol. II, p.146. Again, for purposes of these plaintiffs, approximately 7 years before their initial exposure. Mesothelioma is an absolutely fatal form of cancer. Death generally occurs from 12 to 15 months of diagnosis. Asbestos is the only known cause of pleural mesothelioma in adults. SF, vol. II, p. 147.

Dr. Wagoner's testimony then focused on the available world literature concerning the dangers of asbestos from 1931 until the present time. SF, vol. II, p. 148. He specifically testified, and demonstrated with hundreds of articles, that it was a *known* risk in the literature in the 1930's that workers, *people using the end products*, were at

risk for lung cancer and asbestos disease. SF, vol. II, p. 149. The review of publications by Dr. Wagoner included medical, scientific and industrial journals that were published throughout the United States and world. For example, *Safety Engineering*, an industry publication, in 1931 contained an article by a Mr. Wilson, President of Wilson Products, Inc., entitled "The Very Least an Employer Should Know about Dust and Fume Diseases." Mr. Wilson states in 1931 that "under the circumstances, (nature of the diseases) that exposure to asbestos *in any form and in every operation in which it is used, is dangerous*. SF, vol. II, p. 149. Another example which demonstrates the risk and the true tragedy of the "asbestos story" is *Industrial Bulletin*, published in 1934 by the Industrial Commissioner of the State of New York, which stated:

> It is quite probable that the disease resulting from the breathing of asbestos dust will be similar to that resulting from silica. If this be so, *manufacturers* or *handlers of asbestos products* might begin here and now to prevent trouble because of the fact like silicosis, the *disease can be prevented; there is no cure*. SF, vol. II, p. 160.

Sixteen years before these plaintiffs were exposed, here is the *Industrial Commissioner* of the State of New York telling manufacturers of *asbestos products* to protect the consumer and user because all of this disease and death could have been prevented and there was no cure.

As Dr. Wagoner testified, the very same techniques and knowledge for prevention of these diseases that exists today, existed in the 1930's and were discussed in articles by Merewether and Andrews. SF, vol. II, p. 161.

One final example of the types of articles reviewed by Dr. Wagoner is an article published in 1949 in the *Journal of the American Medical Association*, entitled *Asbestosis and Cancer of the Lung*. In the article, they report that "since some 20,000 workers are employed in the asbestos producing industries in this country and Canada, and *many thousands* in various asbestos consuming industries, that "increased attention to this probable occupational hazard of cancer of the lung by the medical profession is desirable." This article dealt with cancer of the lung; the hazards of asbestosis had already been established for twenty years. These articles illustrate, along with the hundreds of other, that the industrial, scientific and medical communities recognized the risk associated with products containing asbestos prior to the initial exposure of any of these men. SF, vol. II, p. 173.

Finally, Dr. Wagoner testified that the knowledge of these dangers was available to industry in the 1940's before any of these plaintiffs went to work in the asbestos industry. SF, vol. III, p. 325. These articles were widely disseminated in professional journals and sent to manufacturers and were available in common libraries throughout the country. SF, vol. II, p. 154-155. These companies each had research staffs and corporate officials knowledgeable enough to know these articles existed. If these defendants had acted responsibly and warned these plaintiffs and thousands of others of the dangers of asbestos, this tragedy would have been avoided.

Clearly, Dr. Wagoner's testimony establishes that, under the surrounding circumstances, in light of all these articles and the research staffs of the manufacturers, that a *reasonable person* would have realized that their conduct in failing to warn created an extreme degree of risk to the safety of these workers.

2. *TESTIMONY OF OTHER MANUFACTURERS DEMONSTRATING THE KNOWLEDGE OF ASBESTOS DANGERS.*

In addition to the literature review by Dr. Wagoner, the plaintiffs demonstrated that other manufacturers knew of the dangers of asbestos products. Specifically, the plaintiffs offered the testimony of William Simpson and documents of Raymark Industries/Raybestos Manhattan; Dr. Kenneth Wallace Smith, Medical Director for Johns-Manville; Barry Castleman, demonstrating Saranac Laboratory testing and findings of Owens-Illinois; Dr. Thomas Mancuso, Medical Consultant to Philip Carey/Celotex; and, Richard Gaze, head of Research and Development for Cape Asbestos. Each of these men and the documents established, without question, that industry knew of the dangers of asbestos and that these defendants, acting as reasonable persons, would have realized the degree of risk to the safety of others.

a) *Deposition of William Simpson and Related Documents.*

A complete reading of the "Sumner Simpson papers" clearly demonstrates that two manufacturers of asbestos products knew and recognized the dangers of asbestos in the 1930's. More importantly, the letters clearly demonstrate that in the 1930's, the manufacturers were knowledgeable of the published literature in England and the United States. The Petitioners urge that these letters are not relevant because they discuss exposure to only miners or plant workers. However, in reading the letters, it is clear that they are not so limited but, rather, relate to the problems of asbestos dust in general. *Jackson*, 750 F.2d 1314 at 1318. The letters further demonstrate that these two manufacturers that were members of various trade associations, similar to the Petitioners here, were concerned for their own financial

interest about the workers obtaining knowledge of the dangers of asbestos dust.

b) *Testimony of Dr. Kenneth Wallace Smith.*

Dr. Kenneth Wallace Smith was the former medical director of Johns-Manville, SF, vol. V,p. 718. He testified that John-Manville was a member of the Industrial Hygiene Foundation, along with many other companies. SF, vol. V, p.722. He testifies concerning the numerous papers that were published by that organization. He discusses studies that were performed at the Saranac Laboratories in the 1930's. SF, vol. V, p. 726-727. These early studies were conducted to find out any effect the inhalation of asbestos dust would have on the lungs of human beings. SF, vol. V, p.728. He recalls the studies performed in England in 1935 and that the studies were well-documented and available worldwide. SF, vol. V, p. 729-730. He testified that studies included civilian people, shopkeepers and people at home. He stated that the studies demonstrated that these "so-called civilian people are human beings, just like the workers," and that they had disease from inhalation of asbestos fibers. SF, vol. V, p. 729-730. He testified that he became knowledgeable with respect to asbestosis and its cause from the first day he joined Canadian Johns-Manville in 1944. SF, vol. V, p. 734. He testifies that it is the inhalation of the asbestos fiber which causes a change, scarring of the pulmonary tissue. SF, vol. V,p. 735. He also describes asbestos-containing products and how he observed them being used. He further stated that those workers using the finished products would definitely have the same hazards. SF, vol. V, p. 741-742. Dr. Smith's testimony clearly demonstrates that the publication of asbestos dangers was widely distributed and available to a manufacturer. His testimony also demonstrates that a manufacturer of products

knew how its products were being used and that those workers were exposed to the dangers of the asbestos-related diseases.

c) *Testimony of Barry Castleman and the Saranac Laboratory Studies on Owens-Illinois Product, Kaylo.*

Barry Castleman authenticates documents that were introduced into evidence concerning studies performed on the Owen-Illinois product, Kaylo. The documents from Saranac Laboratories, beginning in 1948, demonstrate that in all of the animals "sacrificed after more than 30 months of exposure to Kaylo dust, unmistakable evidence of asbestosis has developed, showing that Kaylo on inhalation is capable of producing asbestosis and must be regarded as a potentially dangerous material." SF, vol. V, p. 765-766. The documents additionally warn the company to take adequate control measures for safeguarding exposed employees. SF, vol. V, p. 766. The Saranac Laboratory documents clearly demonstrate that studies were being performed on the effect of inhalation of asbestos fibers from end products and that the product must be treated as an industrial hazard. SF, vol. V, p. 766-767. Owens-Illinois was one of the other defendants in this trial. When this testimony is combined with the testimony of Dr. Kenneth Smith and the Sumner Simpson papers, it is clear that studies were performed by manufacturers at Saranac Laboratories in the 1930's and 1940's.

d) *Dr. Thomas Mancuso Testimony.*

Dr. Thomas Mancuso was a medical consultant hired by Philip Carey/Celotex, one of the Petitioners in this case. SF, vol. V, p. 772. He testified the company had been

engaged in the manufacture of asbestos products for several decades, SF, vol. V, p. 772. He testified that the asbestos problem included everybody "who bought and used the product." SF, vol. V, p. 775. Dr. Mancuso reviewed the literature on the dangers of asbestos and furnished management with copies of some of the literature. SF, vol. V, p. 780. He also testified that he prepared an Occupational Health Program for Philip Carey/ Celotex that detailed the health problems of asbestos and made recommendations to them. Dr. Mancuso was fired after submitting the program. Again, Dr. Mancuso's testimony demonstrates the availability of literature and the knowledge of dangers associated with the use of asbestos products. His study occurred in the early 1960's.

e) *Testimony of Richard Gaze.*

Richard Gaze worked as chief scientist for Cape Industries, a South African company engaged in the mining of raw asbestos. He held a chemistry degree and began employment in 1940. He testifies that he knew of the dangers of asbestos from his first day of employment. He testifies the dangers include disease and death. He also testified that precautions had to be taken in handling not only raw asbestos, but also end products. He specifically testifies that he met, on several occasions, with corporate officials of Pittsburg Corning Corporation prior to their entering into the asbestos-containing product. At the beginning of this trial, Pittsburg Corning was also a defendant. Dr. Gaze's testimony clearly demonstrates the world-wide scope of the knowledge and danger.

3. *CROSS-EXAMINATION OF DR. CLARK COOPER.*

Respondents demonstrated that the world literature available to a manufacturer clearly establishes the danger of asbestos in products to the user of the product. Additionally,

the testimony and documents of other manufacturers clearly demonstrates that this literature was known, reviewed and that the knowledge of the dangers of asbestos were recognized by the manufacturers of asbestos products. Respondents contend that this testimony unquestionably establishes that "under the surrounding circumstances, a reasonable manufacturer would have realized that his conduct created an extreme degree of risk to the safety of others. The cross-examination of Dr. Clark Cooper, one of the witnesses called by Garlock on behalf of the Petitioners, clearly demonstrates the Respondents' position.

Dr. Clark Cooper has been a consultant to Fibreboard and Garlock. SF, vol. XI, p. 1852-1853. He was first contacted by Fibreboard/Pabco in 1968 or 1969. SF, vol. XI, p. 1853. He was contacted by Garlock in 1983. SF, vol. XI, p. 1852.

Dr. Cooper testified that b y 1927, asbestosis was a recognized disease. SF, vol. XI, p. 1873. By 1946, he stated, "of course, it was a well-known industrial disease by then." SF, vol. XI, p. 1880. He states that there is no question that knowledge that the disease, asbestosis, was being caused by asbestos was certain by 1930. SF, vol. IX, p. 1884.

Dr. Cooper confirmed that as of September 1, 1947, that asbestosis was a compensable on the job disease in the State of Texas. He was asked, "this means that somebody with the state of the art knowledge knew that asbestosis was a dangerous occupational disease then, didn't they?" Dr. Cooper answered, "How could they not have known in 1947?" The initial exposure of each of these plaintiffs was approximately three years later.

Dr. Cooper testified that knowing that asbestos could cause a disease was enough of a warning flag to find out where and when it occurred. SF, vol. IX, p. 1896. By 1930, there was enough knowledge of the disease available to put a manufacturer on notice and that it was certainly something he (a manufacturer) should think about. SF, vol. IX, p. 1897. In the 1940's, the knowledge of asbestos causing asbestosis was certainly available to industry. SF, vol. IX, p. 1898. Dr. Cooper was questioned concerning the literature from 1931 to 1965 and agreed that "there is no occupation exempt" from the dangers associated with the asbestos products. SF, vol. IX, p. 1942. Finally, this exchange:

> Q. Doctor, would you agree with me that that's an absolutely mass of reported articles, editorials, case studies, medical studies, and everything coming all the way from 1931 in *Safety Engineering* till 1963, dealing with asbestosis and lung cancer in insulators and other similar workers? Won't you agree with that?
>
> A. Yes. There were a large number of case reports.
>
> Q. And that not just a red flag or a warning flag, that's just warning flag after warning flag after warning flag, isn't it?
>
> A. Yes, They certainly when piled up together and looked at together are impressive. SF, vol. IX, p. 1848.

Dr. Cooper was then asked about the testimony of these manufacturers and their knowledge. He was asked concerning Richard Gaze testimony in 1942 "that from the

very first day I went to work, I knew that asbestos was dangerous and you had to take precautions." Dr. Clark replied candidly:

A. I would have known it if I had had any responsibilities involving asbestos.

Q. By 1942, if it'd been your responsibility for a company, you's have known the dangers, wouldn't you?

A. I think I certainly would from what was known in 1942.

There cannot be a more simple and honest statement of the truth from this, one of the defendants' expert witnesses. He had to candidly admit, as each of us would, that if it had been his responsibility, he would have known in 1942. That is objective proof that under the surrounding circumstances, a reasonable manufacturer would have known that his conduct created an extreme degree of risk to the safety of others. Dr. Cooper further admitted that even if the risk of asbestosis and cancer was one out two hundred, it would be an intolerable risk if it could be prevented. SF, vol. IX, p. 1958. As previously demonstrated, Dr. Wagoner testified that approximately 1 out of 2 or 50% of asbestos workers would die from a asbestos-related cancer.

4. *CROSS-EXAMINATION OF EDMOND TORBOHN.*

Edmond Torbohn began working for Fibreboard Corporation/Pabco in 1943. He testified the company had been in existence since the 1900's. He was a trained chemist with a master's degree from Stanford University. He testifies his education was equal to the education a chemist

would receive in England. SF, vol. XII, p. 2165, 2166. In fact, it was established that he had the same training that Richard Gaze had received. He also worked as a plant manager. SF, vol. XII, p. 2167. He admits to knowing health problems of asbestos workers in the textile and mining industry in the 1950's. SF, vol. XII, p. 2168. He admits he knew that men like these plaintiffs were using their products, sawing them, cutting them, hammering them, fabricating and *breathing* the dust. SF. vol. XII, p. 2169. He reviewed product manuals and brochures placed into evidence and admitted there was not a single word of warning in the catalogs or literature of the dangers of asbestos. SF, vol. XII, p. 2173.

Fibreboard Corporation of "Pabco" admits it manufactured and sold products containing asbestos between 1940 and 1972 in the State of Texas. SF, vol. II, p. 115. The products sold by Fibreboard were various pipe covering insulation materials. (See Strong's testimony, SF, vol. II, p. 116. Fibreboard admitted that insulation applicators, helper or mechanics were foreseeable users of its products. SF, vol. II, p. 116. Fibreboard states that *no studies* were made by it concerning the effects of the inhalation of asbestos fibers on one using or being exposed to its products. SF, vol. II, p. 106. Fibreboard admits it conducted *no studies designed to minimize or eliminate the inhalation of asbestos fibers* by users of its products. SF, vol. II,p. 116-117. The plaintiffs testified that *no warning ever appeared on Fibreboard products*. Fibreboard claims it placed a warning in 1965. However, it offered no evidence of a box or any carton displaying the warning. The only evidence of a warning was a copy of a caution label. Fibreboard never warned of the dangers in the 1930's, 1940's or 1950's. It was highly disputed whether or not Fibreboard ever warned. The jury, having heard the testimony, was entitled to

conclude that Fibreboard knew of the dangers and made a conscious decision not to test, study or warn of the dangers of its products.

Plaintiffs, by this evidence, have clearly met the test of *Williams v. Steves Industries*, 699 S.W.2d 570, concerning proof of gross negligence. Unfortunately, it is impossible for a plaintiff to make a defendant admit it had actual knowledge of the dangers of its products. The Texas Supreme Court, recognizing that reality, specifically provided a means for the plaintiff to prove gross negligence circumstantially. Plaintiffs demonstrated the "surrounding circumstances" of the development and dissemination of knowledge of the dangers of products containing asbestos and proved that Fibreboard had trained personnel on staff. As Dr. Cooper admitted, by 1947, how could they not have known?

The test of *Williams*, 699 S.W.2d 570, is would a "reasonable person" have realized that his conduct created an extreme degree of risk to the safety of others. Thousands of workers were dying; articles were being published world-wide; studies were being performed in the United States in the 1930's; clearly a reasonable manufacturer would have known of the risk.

The answer of these defendants is either we didn't know "our products" would cause harm or we relied on the industry standard threshold limit value. Both arguments fail. Why would there be an industry threshold limit value if there was no danger? This company had a duty to test and inspect its products. It did not. Even if it did rely on the TLV, any amount of care for the safety of workers using their products required that the manufacturer *warn of the danger and inform the worker to suppress the dust*. The honest truth is that this company made a *conscious decision* to ignore the danger, not inform the worker, and let thousands die and suffer from the

use of their products. The "bottom line," as stated by the defendants, is that their conduct demonstrates they simply did not care.

The Court of Appeals, properly applying the test set out by this Court in *Williams*, 699 S.W.2d 570, evaluated the entire record and evidence and concluded that the jury had sufficient evidence to infer that this company had knowledge of the dangers of asbestos. The Court states specifically:

> From the surrounding circumstances, the jury had sufficient evidence to infer that Fibreboard's decision not to warn the users of the dangers of its products was made with *conscious indifference* to the potential injuries to the users and that this conduct created an extreme risk. *Pool*, 813 S.W.2d 658 at 690.

Finally, Fibreboard argues that the Texas common law system violates due process according to *Haslip*, 111 S.Ct. 1032 (1991). Respondents would reurge their argument concerning the adequacy of the common law method previously discussed. Clearly, this Point of Error must be denied.

E. *The Court of Appeals Properly Reviewed the Evidence as to Flintkote and Affirmed the Punitive Damage Award.* (Additional Reply to Flintkote II.)

Respondents would reurge the arguments previously made under C and D above concerning the due process arguments and review of the evidence to establish the surrounding circumstances. Once again, the Court of Appeals reviewed the standards set out by *Williams*, 699

S.W.2d 570 (Tex. 1985), and the evidence, and concluded that as to Flintkote there was sufficient evidence to support the jury's findings of gross negligence.

By Request of Admissions and Answers to Interrogatories, Flintkote admitted that it was in the business of manufacturing asbestos-containing products from 1940 to 1972. SF, vol. II, p. 120. Flintkote admits its products were sold and distributed in Texas. SF, vol. II, p. 120-125. Prior to 1970, Flintkote did not have anyone in the company whose job it was to go to areas where its products were being used or installed to make a dust level count. SF, vol. II, p. 123. Flintkote admitted that it had *never conducted any studies concerning the effects of the inhalation of asbestos dust* or fibers on one using its products. Flintkote does admit to being a member of *various industry organizations that may have conducted studies*. SF, vol. II, p. 123. Flintkote admitted that it had *never conducted any studies* concerning the effects of the inhalation of asbestos dust or fibers on one using its products. Flintkote admits it had a *research department that was established in the 1940's* and has operated continuously since that time. However, it *has not conducted any research concerning the health effects of asbestos*. SF, vol. II, p. 124. Flintkote has *never recalled any of its products* containing asbestos, SF, vol. II, p.125, and has *never warned the users* of its products concerning the dangers. (Plaintiffs testified they had never seen a warning and Flintkote never denied or refuted the evidence.

Essentially, although Flintkote had a research department and was a member of various trade organizations, it made the conscious corporate decision not to study the harmful effects of asbestos, test its products, or warn of the dangers. As the Court of Appeals pointed out, Flintkote cannot point to any evidence that the levels of asbestos in its

products met any standards. To the contrary, plaintiffs provided testimony that asbestos from its product when it became dry powders into dust and was inhaled by these workers. The medical testimony clearly established that inhalation of asbestos fibers created an unreasonable health risk. Furthermore, the record is filled with expert testimony, previously described, that a product that contains asbestos which emits fibers during use is dangerous and creates an extreme risk of disease and death.

Finally, Flintkote complains that the instructions given by the Trial Court were defective, ambiguous and perfunctory. (Flintkote Application for Writ of Error, p. 27.) However, nowhere in this record does Flintkote point to an objection to the instructions given by the Trial Court and the tender of an instruction by Flintkote in substantially correct form to preserve any alleged error. Texas Rule of Civil Procedure 278 clearly states that the failure to submit a definition or instruction shall not be deemed a ground for reversal unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment. The failure of Flintkote to tender any instruction waives any alleged error in the Court's instructions. Furthermore, the Trial Court's instructions and definitions were appropriate issues in personal injury cases. See 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 4.02 and 7.06.

Flintkote, additionally complains of post-verdict review for excessiveness of the punitive damage award. However, as previously mentioned, Flintkote did not raise any Point of Error before the Court of Appeals or in its Motion for Rehearing that the award of punitive damages was excessive. Nevertheless, the Court of Appeals specifically reviewed this award utilizing the *Alamo*, 616 S.W.2d 908 (Tex. 1981), factors. Having failed to preserve any such error, this Court

lacks jurisdiction to review the excessiveness of the award. Clearly, as to Flintkote, this Point of Error must be denied.

XVI. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S JUDGMENT AGAINST GARLOCK UNDER STRICT LIABILITY FOR ACTUAL DAMAGES BECAUSE THE EVIDENCE ESTABLISHED THAT GARLOCK KNEW OR SHOULD HAVE KNOWN OF THE DANGERS OF ITS PRODUCTS, THAT THE GARLOCK PRODUCTS WERE DEFECTIVE FOR FAILURE TO WARN AND THAT THE GARLOCK PRODUCTS CONTRIBUTED TO CAUSE THE PLAINTIFFS INJURIES. (Reply to Points of Error; Garlock I, II, III.)

The Court of Appeals specifically addresses Garlock's products and the appropriate authorities at *Pool*, 813 S.W.2d 658 at 687-688. The Court of Appeals correctly cites case authority and the application of the record to that authority and unequivocally finds sufficient evidence to support the jury's findings.

There are numerous incorrect statements by Petitioner, Garlock, in its brief concerning the record and Opinions cited by the Court of Appeals. However, initially, in considering these Points, the standard of review of a "no evidence" Point of Error must be reurged. Garlock attempts a complete retrial and re-weighing of its evidence before this Court.

This Court does not have jurisdiction for Garlock to make a factual sufficiency of evidence argument. Garlock has lost that argument twice, once before a jury and once before the Court of Appeals. The factual sufficiency of the evidence argument has ended and most of Garlock's Brief concerns that type of argument.

This Court, in deciding a "no evidence" challenge, must consider *only* the evidence and inferences tending to support the finding and *disregard* or *ignore* all evidence and inferences to the contrary. If there is any evidence of probative force to support the jury finding, then this Point must be overruled. *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965). Instead of attacking the Court of Appeals Opinion under the appropriate standard of review, Garlock, in great detail, recounts its evidence and inferences opposing the jury findings and ignores Respondents' evidence that supports the jury's findings. Furthermore, Garlock continually mixes decisions that combined design defect allegations and failure to warn allegations and confuses the separate and distinct causes of action.

Garlock's products were properly identified and proven defective by Dr. Wagoner, Charles Kimball Flint, Charles Strong, and Dr. Clark Cooper. Garlock's Brief on this issue demonstrates an unfortunate lack of understanding of the fundamental difference between a strict liability/design defect case and a strict liability/failure to warn or marketing defect, such as this, case. No allegation was made by the plaintiffs of a design defect. No evidence was ever offered to prove a design defect. The utility of a product and the balancing of utility and risk apply to design defect cases, not marketing defect or failure to warn cases. In a marketing defect case, it is assumed the product has utility. Nevertheless, the risks associated with the product are such that it is unreasonably dangerous if unaccompanied by an adequate warning. The

cases cited and quoted by Garlock, *Gideon* 765 F.2d 1129 (5th Cir. 1985) and *Dartez*, 765 F.2d 456 (5th Cir. 1985), contained allegations of both design and marketing defects. The language cited by Garlock from these opinions related to the Court's discussion of the design defect allegation, not the failure to warn or marketing defect allegation. It is imperative, in reviewing the evidence of product defect, that the principles and elements of strict liability/failure to warn be understood.

A. STRICT LIABILITY FOR FAILURE TO WARN.

Under Texas law, a manufacturer of a defective product may be liable under the theory of strict liability in tort as expressed in **RESTATEMENT (SECOND) OF TORTS § 402A (1964)** *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, (Tex. 1964). Section 402A provides, in relevant part, that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the ultimate consumer or user."

The bedrock authority in an asbestos case if the Texas diversity opinion of *Borel v. Fibreboard Paper Products Corp.* 493 F.2d 1076 (5th Cir. 1973). In discussing the failure to warn cause of action, the Fifth Circuit quoted comment (j) to section 402A, for the underlying principle that a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. *Id.* at 1088. *See also*, *Dartez*, 765 F.2d 456 (5th Cir. 1985), at 461 in response to Garlock's assertion that the Court of Appeals has changed the law in these cases. The Fifth Circuit in a Texas diversity case holds, "Dartez was required to establish that the dangers of asbestos were reasonably foreseeable or sufficiently

discoverable *at the time of his exposure* before these defendants could be found liable. The Court of Appeals *does not* establish a post-sale duty to warn, as fabricated by Garlock. Under the facts of these cases, an;y distinction between time of sale or exposure is inconsequential because the events coincided and the evidence establishes that each of the manufacturers knew or should have known years before any of the Respondents began working in the asbestos trade and prior to the sale of the products. As pointed out by Garlock on p. 8 of its Application, the time period of the plaintiffs' *exposure* in these cases sets the "time frame within which it must have had the requisite knowledge." In determining whether or not a danger is reasonably foreseeable, the manufacturer is held to the knowledge and skill of an expert. The manufacturer's status as an expert means that, at a minimum, he must keep abreast of scientific knowledge, discoveries, and advances, and is presumed to know what is imparted thereby. *Id.* at 1089. A manufacturer has the absolute duty to test and inspect his product. Furthermore, a product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal *Id.* at 1090.

Asbestos is a known toxic and poisonous substance when the fibers are released in the air and inhaled by human beings. It is recognized to be the cause of disease and death through the asbestos-related diseases of asbestosis, many forms of cancer and mesothelioma. As early as 1931, it was reported in *Safety Engineering*, and numerous scientific and medical publications, that exposure to *asbestos in any form and in every operation in which it is used, is dangerous*. SF, vol. II, p. 149.

It is the position of the plaintiffs that any product that contains asbestos is "unavoidably unsafe" if the foreseeable use of the product results in airborne release of asbestos

fibers. Dr. Wagoner, in his testimony, traces the scientific literature from 1898 to today, demonstrating the thousands of articles that warn of the dangers of breathing asbestos fibers. SF, vol. II, 127-208. Under Texas law, it has been held that if a product contains toxic or dangerous ingredients not obvious to the typical user, the manufacturer's duty to know of the danger and issue an appropriate warning is virtually absolute. *Muncy v. Magnolia Chemical Co.*, 437 S.W.2d 15 (Tex. Civ. App. - Amarillo, writ ref'd n.r.e.). Similarly, *Borel*, 493 F.2d at 1088, quoting comment (k) to section 402A of the Restatement, held that "unavoidably unsafe products" are those which, in the present state of human knowledge, are incapable of being made safe for their ordinary and intended use. The failure to give adequate warnings in these circumstances renders the product unreasonably dangerous. *Borel*, 493 F.2d at 1089.

B. EVIDENCE OF THE DANGERS OF ASBESTOS IN PRODUCTS.

Plaintiffs demonstrated through numerous medical and scientific articles beginning in 1898 and expert testimony, the dangers of asbestos and that there was *no safe level of exposure to asbestos*. SF, vol. II, p. 137, 143. Asbestos is a known cause of, not only asbestosis, but also many types of cancer, including lung cancer, including lung cancer, stomach cancer, esophageal cancer, and mesothelioma. SF, vol. II, p. 142. Consequently, it has been published in the Federal Register, and the World Health Organization has concluded that there is *no safe level of exposure to asbestos*. SF, vol. III, p. 322, 327-328.

In 1931, Dr. Wagoner testified, *Safety Engineering* published the following concerning the dangers of asbestos:

> We do know, however, that breathing of dust under the following conditions is seriously harmful; *asbestos and every operation in which it is used*. SF, vol. III, p. 335.

Dr. Wagoner further detailed hundreds of articles that dealt with the dangers of asbestos in many operations, including gasket material and packing. To dispute this evidence, the Petitioners attempt to rely on threshold limit values. Their entire argument misses the point of a failure to warn case.

Threshold limit values (TLV's) were initially industry's values. SF, vol. III, 325. The proposition is that *if* asbestos dust is kept below the threshold limit value, then no disease will develop. However, as reported by the New York Academy of Sciences in their discussions, such a limit has no scientific basis whatsoever. SF, vol. III, p. 327. Even Garlock's expert, Dr. Clark Cooper, admitted during questioning by Garlock that "there was no standard." There was a guideline recommended by ACGIH. He states, "They carefully did not use the word standard." Garlock, by footnote on p. 7 of its Brief, would have this Court believe that it established in this record "government regulations." As Dr. Cooper's testimony demonstrates, there was no regulation or standard at the time of exposure of these men in the 1950's and 1960's. SF, vol. X, p. 1803. (In the 1970's, Dr. Cooper did testify that OSHA for the first time had regulatory power and "said, oh, we'll just take this ACGIH twelve and two, two million particles per cubic foot, and twelve fibers per cc, and we'll just adopt that." He continues, saying, "There was an immediate outcry, people said, "That's not a strict enough standard." SF, vol. X, p. 1807.) Dr. Cooper, in discussing these guidelines and the lowering of the guidelines, states:

> That number is great for the books, but the thing that prevents people from dust exposures are proper work practices and proper supervision. SF, vol. IX, p. 1829.

Proper work practices and supervision depend upon being warned of the risks associated with the products. Therein lies the very essence of a failure to warn case. The manufacturer has the affirmative duty to warn of the dangers associated with its products. Quite simply, Garlock never warned of the dangers associated with its products.

Assuming, arguendo, that such a limit existed, it does not defeat the plaintiffs cause of action or evidence. Garlock *never warned the user of the products to keep the dust level below any threshold limit value.* Garlock *never communicated to the worker or their employers that dust should be suppressed, that asbestos in the dust would cause disease and death. The very basis of the entire cause of action was that the information was never told to the consumer or user.* The entire TLV argument of the Petitioners is without basis or merit. The fact that Garlock, in 1982, 50 years after the dangers were known, in a *controlled test for litigation purposes*, demonstrates small amounts of asbestos fibers being released when its product is used, does not and cannot defeat the right of workers to know the risks associated with that asbestos fiber. SF, vol. X, p. 1797, 1799. Garlock's expert witness, Dr. Clark Cooper, never performed any tests on Garlock's asbestos products. SF, vol. XI, p. 1852.

Finally, the Petitioners argue that an agency of the federal government adopted its values and, thus, their products are not defective. Initially, it must be noted that none of these Petitioners tested for concentrations of dust in the actual field where these men used the products in the 1950's, 1960's and 1970's. Secondly, the defendant

manufacturers, not the government, are charged with the responsibility of knowing the dangers and informing the consumer.

> Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger in its product. Rather, each manufacturer must bear the burden of showing that its own conduct was proportionate to the scope of its duty. *Borel*, 493 F.2d at 1090.

Additionally, in the New York Academy of Sciences, it was reported by a member of industry:

> The TLV's are industry's values, but industry generally does not develop anywhere near enough kinds and amounts of data that can be used to establish a TLV of a new substance, but industry has the sole responsibility to develop data on its own products. Government is not in a position to develop enough facilities to handle the problem in total, nor should it when reliable toxicological consultants are now available. SF, vol. III, p. 325.

Dr. Wagoner also testified, as a member of the committee that adopted the industry TLV's, that the standard was lowered. More importantly, he repeatedly emphasized that the government recommendation included not only suppression of dust below the TLV, but also, *that the TLV be coupled with worker education*, a *respirator program*, and *warning labels*. The Petitioners continually assert only part of the recommendation. The rest of the recommendation clearly requires *warning the consumer which is the basis of this lawsuit.* SF, vol II, p. 216.

Finally, the argument of Garlock completely ignores the nature of the asbestos diseases. All asbestos-related diseases are dose-response diseases. The concept of dose-response or exposure response is that the more exposure that you have to a substance, the greater chance of getting the disease. SF, vol. III, p. 210. The exposure to asbestos and the relationship to asbestos-related disease is cumulative. Thus, any exposure over a man's working career could have contributed to his overall condition. *Borel*, *Id.* at 1092. In fact, the medical testimony of Dr. Britton further establishes this relationship. Dr. Britton testified that in the medical literature of scientific literature it is established that just a small amount or small period of exposure, years ago, can be important as a disease producer. He further testifies that actually a brief exposure, perhaps one day, can stimulate some degree of process. SF, vol. III, p. 384.

C. GARLOCK'S PRODUCTS ARE DEFECTIVE.

As demonstrated by this testimony, products that contain asbestos are "unavoidably unsafe." The testimony of Dr. Wagoner clearly established that knowledge of the toxic and deadly nature of asbestos was known in the 1930's. Therefore, to prove the products of Garlock defective, it was necessary for the plaintiffs to prove the specific products manufactured by Garlock, utilized by the plaintiffs, contained asbestos, that asbestos fibers were released into air when the product is used in a foreseeable manner, and that the products failed to have a timely and adequate warning.

1. *Garlock Products were Used by the Plaintiffs and Contained Asbestos.*

Mr. Charles Strong testified that Garlock made three or four types of asbestos packing and gasket material that these men worked with at Texas Eastman. Mr. Strong positively

identified from a Garlock product book, Garlock 257, Garlock 252, Garlock asbestos yarn and Garlock sheet gasket material. SF, vol. VII, p. 1148-1151. Mr. Strong also described the products and how he and the other plaintiffs used the material. He stated that these products were used at Texas Eastman in the '50's, '60's and '70's. He testified that these products manufactured by Garlock contained asbestos. SF vol. VII, p. 1148-1151.

Mr. Charles Kimball Flint, the purchasing agent for Texas Eastman, also testified concerning Garlock products. SF, vol. XV, p. 2720. Mr. Flint testified that he had purchased products from Garlock that contained asbestos. SF, vol. XV, p. 2788. He testified that he remembered purchasing *compressed asbestos sheet packing* and *square braided asbestos packing* that would be used for *sealing joints* and *for packing pumps or packing valves*. SF, vol. XV, p. 2789. He also testified that the asbestos sheet packing was a gasket material that had to be cut to be used and was used in all the buildings in Texas Eastman, "plant-wide." SF, vol. XV, p. 2801-2802.

Obviously, completely contrary to Garlock's assertions in its Brief, these men testified to use of specific Garlock products that contained asbestos in the 1950's, 1960's and 1970's. Plaintiffs, Freeman, Strong, Sledge and Pool worked together at Texas Eastman, used the same products in the same manner. SF, vol. VII, p. 1114-1115.

2. *Garlock Products Released Asbestos Fiber when Used in a Foreseeable Manner.*

Mr. Charles Strong specifically testified that Garlock products had to be replaced and when being replaced, were dusty. SF, vol. VII, p. 1152. In the process of removing

the old worn out packing material, it was necessary to scrape it, beat it, and pull on it. SF, vol. VII, p. 1152-1153. He further testified that this work was performed throughout the years he worked at Texas Eastman. SF, vol. VII, p. 1153. He also described cutting the gasket material many times with pocket knives and machines and every time it was cut, asbestos dust and fibers were released. SF, vol. VII, p. 1106-1107, 1153.

Clearly, it is foreseeable by the manufacturer of packing and gasket material that gasket material will become dry, worn out and have to be replaced. Garlock knew its products were used in refineries and large plants and is charged with knowing the foreseeable use, application and removal of its products. *Borel v. Fibreboard Paper Corp.*, 493 F.2d 1076 (5th Cir. 1973). Garlock has never asserted that these men were not using their products in a foreseeable manner.

Garlock *incorrectly states that Dr. Wagoner did not testify concerning the dangers of asbestos in this type of product or used in this manner.* Dr. Wagoner, referring to articles published in *1932* and *1935* discussing conditions under which *asbestosis* was known to occur, found that the people were working with "*packing and joining.*" SF, vol. II, p. 156-157. He continued citing publications, in 1960 where the diseases asbestosis and associated cancers were found in people working as "*asbestos packer*" and "*unpacker.*"

Clearly, sufficient evidence was presented concerning the release of asbestos fibers from Garlock products when used in a foreseeable manner and the association of asbestos related disease with the use of this type material.

3. *Garlock Failed to Warn.*

Mr. Strong and all the plaintiffs testified that there was not a warning on any box of insulation used in Texas Eastman. SF, vol. VII,p. 1111. He further testified that no one from Garlock ever gave him any kind of warning concerning the dangers of asbestos. SF, vol. VII, 1158.

Finally, Mr. Flint, the purchasing agent for Texas Eastman, testified that he had never received any type of warnings or instructions concerning products containing asbestos. SF, vol XV, p. 2786-2787.

D. SUFFICIENT EVIDENCE EXISTS IN THE RECORD THAT EXPOSURE TO GARLOCK PRODUCTS IS A PRODUCING CAUSE OF PLAINTIFFS INJURIES.

As previously demonstrated through the testimony of Dr. Wagoner and Dr. Britton, sufficient evidence exists to support the jury finding that exposure to Garlock's products was a producing cause of the plaintiff's injuries. Dr. Wagoner described the dose-response nature of asbestos-related disease. SF, vol. III, p. 210. Dr. Britton testified that a small amount of exposure, even for a single day, can stimulate some degree of the disease process. SF, vol. III, p. 384. All doctors agreed that it is the cumulative exposure over many years that causes the asbestos-related diseases.

Garlock cites as authority, *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985). Counsel for these plaintiffs also represented at trial and on appeal, Mr. Gideon. The *Gideon* facts and record are different and distinguishable from these cases as it relates to product defect. Garlock correctly notes that *Gideon* was reversed as

to Raymark's products. However, Garlock ignores the record testimony in *Gideon*.

Mr. Gideon did not testify that *he ever used a Raymark product*, but that for the most part, he carried, loaded and sometimes relabeled Raymark products. He did not testify that *any dust* was created when he handled Raymark products. Mr. Gideon claimed to have only cut one Raymark product, one time. Furthermore, he testified that when he cut the sheet into gasket material, no dust was created. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985), at 1144. The plaintiffs in this case proved use and dust from specific Garlock products. The plaintiffs' evidence established that Garlock products were used "plant-wide" from the 1950's to today.

In *Gideon*, there was no evidence that Gideon's inhalation of a relatively small amount of asbestos fibers was a substantial factor in causing his condition. *Id.* at 1145. Plaintiffs in this case provided testimony of Dr. Britton concerning the effect of inhalation of asbestos, even in small amounts. Plaintiffs also established substantial exposure to asbestos fibers from Garlock products used throughout the plant over a 30 year period.

Finally, Garlock quotes *Gideon*, 761 F.2d at 1144, for the statement that "compliance with such government safety standards constitutes strong and substantial evidence that a product is not defective." This quote is made by the Court pursuant to a *factual* sufficiency argument. Respondents don't suggest that compliance is not some evidence of no defect, but it does not *conclusively establish* the fact. In fact, the Fifth Circuit specifically refused to hold exposure to levels of asbestos from Raymark's products foreclosed the issue of product defect and producing cause. The Fifth Circuit wrote:

> We reach this conclusion only on the record before us and do not hold that such proof might not be possible in another case.

The fact is, Raymark repeatedly had judgments rendered against it after *Gideon* to such an extent it has now declared bankruptcy.

Finally, as authority, Garlock cites *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). Again, Garlock ignores the facts of *Dartez*, which were virtually the same as *Gideon*, 761 F.2d 1129. Dartez testified that he had limited use of asbestos cloth manufactured by Raymark.

Unlike the plaintiffs here, Dartez testified that he wrapped asbestos cloth around fittings and joints, but never stated that he *cut* asbestos cloth or *that his use of this cloth produced dust*. *Dartez*, 765 F.2d at 470. Similar to *Gideon*, 761 F.2d 1129, the Court observed that Dartez offered no evidence that limited exposure could be a producing cause of his injuries. *Dartez*, 765 F.2d at 471.

In contrast to the *Gideon* and *Dartez* cases, the plaintiffs in this case elicited specific testimony, as demonstrated, on each of the missing facts in *Gideon* and *Dartez*. The jury, obviously, had to resolve the conflict in the evidence between the parties. Sufficient evidence exists in this record to support the jury findings against Garlock. Consequently, these Points of Error must be overruled.

APPENDIX D

NO. D-1376

IN THE SUPREME COURT OF TEXAS

NO. 06-90-00014-CV

FIBREBOARD CORPORATION, et al
Petitioners,

(CONSOLIDATED)

v.

REUBEN S. POOL, et al,
Respondents.

NO. 06-90-00022-CV

FIBREBOARD CORPORATION, et al
Petitioners,

(CONSOLIDATED)

v.

LESSIE L. WILLIAM, et al,
Respondents.

RESPONSE TO MOTIONS FOR REHEARING
FILED BY THE PETITIONERS

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NO. D-1376

IN THE SUPREME COURT OF TEXAS

FIBREBOARD CORPORATION, et al
Petitioners,

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v.

REUBEN S. POOL, et al,
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FIBREBOARD CORPORATION, et al
Petitioners,

(CONSOLIDATED)

v.

LESSIE L. WILLIAMS, et al,
Respondents.

RESPONSE TO MOTIONS FOR REHEARING
FILED BY THE PETITIONERS

TO THE HONORABLE JUDGES OF SAID COURT:

Respondents file this Response to the Motions for Rehearing filed by the Petitioners and move that the Motions for Rehearing be denied. The Petitioners do not urge a

single new or different basis for reversal of this Court's November 11, 1992, Order dismissing the Court's Writ of Error as having been improvidently granted. The Court, having fully considered the Petitioners' arguments and having already heard oral argument, should deny the Motions the Rehearing.

I.

Punitive Damages.

Owens-Illinois and Celotex urge this Court to create either a new procedure for consideration of prior awards of punitive damages or remand this punitive award to the Trial Court for consideration of prior awards. The fact is that each of these defendants did receive post-verdict review of prior awards by the Trial Court through post-verdict motions. Furthermore, the record at argument before this Court disclosed that each had paid only one punitive award. Texas law did provide these Petitioners with adequate review, meeting the tests of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). The precise constitutional arguments made by these Petitioners have been previously reviewed and considered by the Fifth Circuit Court of Appeals and Certiorari was refused by the United States Supreme Court in *King v. Armstrong World Industries, Inc.*, 872 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236. Furthermore, these Petitioners have not asserted that this particular award was excessive or not supported by sufficient evidence.

Fibreboard now attempts to assert that it, in fact, did challenge the punitive damage award under a no evidence challenge. In fact, it did not do so but, rather, attacked this Court's Opinion in *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, (Tex. 1985), and the application of that Opinion

by the Court of Appeals. A review of the Court of Appeals' Opinion and the *Williams* Opinion clearly demonstrates that the Court of Appeals correctly applied Texas law. These arguments were fully briefed and considered by this Court prior to its November 11, 1992 Order. No new or additional compelling reason is urged for a reversal of the Court's Order.

II.

Sumner Simpson Instruction

Again, Petitioners do not raise a single new argument concerning this issue. The standard of review concerning the giving of an instruction by the Trial Court is abuse of discretion. The Trial Court has considerably more discretion in submitting instructions and definitions than it has in submitting issues. *First State Bank and Trust Company of Edinburg v. George*, 519 S.W.2d 198 (Tex. Civ. App. - Corpus Christi 1975, writ ref'd, n.r.e.)

The Fifth Circuit, sitting in Texas diversity cases, has uniformly held that this evidence is admissible and relevant on the issue of the knowledge available to the industry of the dangers of exposure to asbestos. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) *cert. denied*, 478 U.S. 1022, 106 S.Ct. 339; *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236. The evidence was admitted without a limiting instruction in *Dartez*, *Jackson*, and *Gideon*. Petitioners argue that because Manville or Raybestos Manhattan were parties that those decisions are not applicable. That argument is not logical nor well founded. If a limiting instruction were necessary, it would be required

whether or not Raybestos Manhattan or Manville were parties. The fact is, the Fifth Circuit has never adopted a rule requiring a limiting instruction for this evidence.

Finally, the limiting instruction tendered by the Petitioners was improper, and overly broad. As evidenced by final argument for Respondents, there was no confusion concerning this evidence. Furthermore, again, the Petitioners do not challenge before this Court the factual sufficiency of the evidence supporting this verdict.

III.

Autopsy Photographs.

The admission of these photographs was fully reviewed by the Court of Appeals, fully briefed and argued before this Court. Petitioners do not urge any new authority or arguments concerning this evidence. The Petitioners have not asserted that the award of the jury was excessive or improper. As Justice Phillips observed during oral argument, this entire issue is moot.

The petitioners, from the beginning of the trial, contested and disputed the involvement of asbestos in the deaths of Mr. Freeman and Mr. Williams. These photographs were specifically relevant to the asbestos disease process involved in these men. They clearly demonstrated the extent of the disease and, coupled with the testimony of a Board Certified Pathologist, proved the disputed issue of asbestos causation of disease. As previously stated in Respondents' brief, under Texas law, the general rule is that pictures or photographs which are relevant to any issue in a case are admissible. Likewise, it has been held that gruesomeness of a photograph does not render it inadmissible. *Texas Employers' Ins. Assn. v. Crow*, 218 S.W.2d 230 (Tex. Civ. App. - Eastland 1949), *affirmed*, 221 S.W.2d 235 (Tex. 1949).

IV.

Garlock

The basis for Garlock's Motion for Rehearing is a no evidence challenge to the finding of product defect for failure to warn. Garlock, like the other Petitioners in their motions, does not make a new argument but, rather, reasserts the argument previously rejected by this Court. Garlock's attempt to reweigh the evidence for factual sufficiency is improper under the no evidence standard of review. Specific evidence, as detailed in Respondents' Brief in Response to Applications for Writ of Error, was produced on each element of Respondents' cause of action. The Court of Appeals exhaustively reviewed that evidence and found it sufficient. Similarly, this Court, having already reviewed and decided this issue, should deny Garlock's Motions for rehearing.

V.

Petitioners summarily re-urge the remainder of the Points of Error included in their Applications for Writ of Error without argument or new authority. Obviously, these issues have been previously considered by this Court and should not new be reconsidered.

Respondents respectfully move that this Court deny each of the Motions for Rehearing filed on behalf of the Petitioners.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that a true copy of this Response was mailed by United States mail, postage prepaid, to all counsel of record on the 2nd day of December, 1992.

/s/ Jamie Kyle
JAMIE KYLE, CLAS

Supreme Court, U.S.
FILED
APR 27 1993
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No. 92-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,
v.
REUBEN S. POOL, ET AL,
Respondents.

On Petition For a Writ of Certiorari To
The Supreme Court of Texas

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

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TO THE HONORABLE COURT:

Respondents herein, REUBEN S. POOL, ET AL, respectfully submit and file this objection, in accordance with Rule 37.4, to the Continental Casualty Company's request for leave to file an *amicus curiae* brief in this case.

I.

A review of Continental Casualty Company's proposed *amicus curiae* brief quickly reveals that it does *not* satisfy the requirements of Rule 37 of the Rules of this Court.

For example, the subject brief is wholly argumentative and does not present this Court with any new questions or issues that have not already been presented by Petitioner, Owens-Illinois, Inc. As such, the brief fails to satisfy Rule 37.1 of the Rules of the Supreme Court. Therefore, its filing should not be favored by the Court.

Furthermore, Continental Casualty Company's *motion* for leave to file does not present this Court with any facts or questions of law that have not already been presented by the parties in this case. Indeed, the first paragraph of the motion for leave to file identifies a single question for the Court:

> ". . .whether multiple awards of punitive damages against a party for a single course of conduct that ended many years ago violates that party's procedural and substantive due process rights."

This question was the second question presented and urged by Petitioner, Owens-Illinois, Inc., in its Petition for a Writ of Certiorari. Obviously, the motion for leave to file an *amicus curiae* brief submitted by Continental Casualty Company does *not* set forth any new or independent question of law. Consequently, the motion for leave to file is in violation of Rule 37.4 of the Rules of this Court.

II.

In addition, the issue of multiple punitive damage awards in the mass tort context has also been presented by other Petitioners in the following cases:

a. No. 92-1471, *Petitioner*, The Celotex Corporation; and

b. No. 92-1474, *Petitioner*, Fibreboard Corporation.

Respondents herein are also the Respondents in the aforementioned cause numbers. As the Court will recall, Respondents submitted a single "Respondents' Brief in Opposition" in reply to all of the petitions for writ of certiorari filed in Cause Nos. 92-1241, 92-1471, 92-1474, and 92-1502. The petitions for writ of certiorari in all of these cases stem from a single trial held in the 4th Judicial District Court of Rusk County, Texas, on October 2, 1989 through October 19, 1989.

In their Respondents' Brief in Opposition, the Respondents *also* addressed the particular question now presented by Continental Casualty Company in its motion for leave to file an *amicus curiae* brief.

In addition, the Continental Casualty Company acknowledges and admits that The Celotex Corporation and Fibreboard Corporation have asked this Court to review the *same issue* now presented by Continental Casualty Company. *See*, Brief *Amicus Curiae* of Continental Casualty Company, p. 3 (footnote 1). The motion for leave to file is therefore in clear violation of Rule 37.1 and Rule 37.4 of the Rules of this Court and should not be granted.

CONCLUSION AND PRAYER

Respondents pray the Court deny and overrule the Motion for Leave to file Brief *Amicus Curiae* of Continental Casualty Company, as the motion presents nothing for review by this Court that has not already been presented by the parties in Cause Nos. 92-1241, 92-1471, 92-1474, and 92-1502.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against Owens-Illinois made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), violated Owens-Illinois' procedural due process rights?

2. Whether multiple awards of punitive damages against Owens-Illinois for a single course of conduct that ended 35 years ago violate Owens-Illinois' procedural and substantive due process rights?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's Petition for Certiorari.

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PETITIONER'S REPLY BRIEF

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1. Respondents make the surprising argument that Owens-Illinois, Inc. ("Owens-Illinois") failed to preserve its procedural due process attack on the outrageous punitive damages award below. They took a different position in opposing Owens-Illinois' petition for a writ of error to the Texas Supreme Court. There they *conceded* that the procedural due process issue was properly raised: "Since the amount or propriety of the award has not been challenged, *the only constitutional questions presented* are whether the potential for multiple awards violates due process *or whether or not the Texas common law method of assessing punitive damages is per se unconstitutional and violates due process.*" Appendix to Respondents' Brief in Opposition to Certiorari ("Opp. App.") 54a (emphasis added). Respondents then argued to the Texas Supreme Court at length that Texas law complied with this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct.

1032 (1991), all without any hint they believed this issue had not been preserved. Opp. App. 60a-64a.

The Texas Court of Appeals recognized that Petitioner Owens-Illinois contended that Texas law failed to provide the procedural safeguards approved in *Haslip*, and that court explicitly addresed this contention in its opinion:

> THE CONSTITUTIONALITY OF PUNITIVE DAMAGES
>
> Appellants next contend that the award of punitive damages violates the due process clauses of the United States Constitution . . . .
>
> In [*Haslip*], the United States Supreme Court held that punitive damage awards do not violate the due process provisions of the fourteenth amendment when the award is based on an objective criterion. . . .
>
> In the present case, the trial court's instruction placed reasonable constraints on the exercise of the jury's discretion by defining exemplary damages as an amount awarded to set an example to others and as a penalty . . . . We conclude that the punitive damage award was based on an objective criterion, and thus, the due process provision of the fourteenth amendment was not violated.

Fibreboard Corp. v. Pool, 813 S.W.2d 658, 686 (Tex. Ct. App. 1991), Appendix to Petition ("Pet. App.") 53a-54a. Nothing in the opinion of the Texas Court of Appeals suggests that Owens-Illinois failed to preserve this issue in the trial court or in its appeal. Indeed, Owens-Illinois specifically raised this due process issue as a separate point of error in its appeal to the Texas Court of Appeal. Pet. App. 95a.

The Texas Court of Appeals plainly understood that Owens-Illinois was attacking, on due process grounds, the procedures followed in reaching and reviewing the puni-

tive damages verdict, and that court just as plainly understood that Owens-Illinois had preserved that issue for appeal.

In its petition for a writ of error to the Texas Supreme Court, Owens-Illinois once again specifically included the due process issue. *Id.* 7a. Respondents, as quoted above, explicitly conceded that the *Haslip* issue was properly raised. Although the Texas Supreme Court, after hearing oral argument on the *Haslip* issue, dismissed Owens-Illinois' petition for a writ of error as improvidently granted, *id.* 3a, the transcript of the oral argument reveals no colloquy on whether the *Haslip* issue was properly before that court.

Respondents' new-found contention is that the *Haslip* issue was not adequately preserved because Owens-Illinois did not seek a remittitur and did not argue the award was excessive. Brief in Opposition at 6. Needless to say, Respondents cite no authority for the extraordinary proposition that an unconstitutional verdict must stand unless the defendant argues it is excessive as well as unconstitutional.

Owens-Illinois preserved at each stage its contention that the punitive damages were invalid under the due process principles announced in *Haslip*.

2. The first question presented by this case is, in its essentials, the same as that presented in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992). Owens-Illinois submits that it may be appropriate for this Court to grant certiorari in this case and then remand to the court below for further consideration in light of the *TXO Production* decision when it is handed down.

The crux of this case is that the Texas Court of Appeal relied on a "shock the sense of mankind" standard of review. Pet. App. 56a. While that court *cited* the "detailed substantive standards" for review approved by

this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991), it did not discuss or apply any of those factors in the context of this case. It merely passed over them in silence. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 686 (Tex. Ct. App. 1991), Pet. App. 55a. Although Respondents assert that "the intermediate Texas appellate court was required to—and did —examine the reasonableness of the punitive damage awards in conformity with the factors set forth in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), Brief in Opposition at 17, nothing in that court's opinion supports that assertion.

The first question presented here, just as in *TXO Production*, is whether this procedure in the State courts for assessing millions of dollars of punitive damages squares with due process. The compensatory damages awarded here amount in total to more than $5 million, while the additional $5 million in punitive damages (including $1.2 million against Owens-Illinois) is a pure windfall to Respondents. The amount of punitive damages received no meaningful review in the Texas courts. The *Pool* Respondents struggle to distinguish *TXO Production*, but the two cases plainly raise similar constitutional issues. Owens-Illinois submits that a grant of certiorari is justified here in order to permit a remand for further consideration in light of this Court's eventual decision in *TXO Production*.

3. Multiple awards of punitive damages for the same course of conduct present a mirror image of the theory offered by Professor Tribe on behalf of Respondents in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992). That theory would have punitive damages measured, not by the harm to the plaintiffs sitting in the courtroom, but by the actual or potential harm to *others*. Brief for Respondents in *TXO Production* at 16 ("TXO was a . . . *repeat* offender") (emphasis added); Transcript of Oral Argument at 17-23, 37-38, 44 (Mar. 31, 1993)

(No. 92-479). The question of harm to others has fundamental implications for the constitutional status of multiple awards of punitive damages for the same course of conduct.

Just as the West Virginia court in *TXO Production* supported the punitive damages award there on the ground that TXO's conduct "could potentially cause millions of dollars in damages to other victims," 419 S.E.2d at 889, the Texas court below asserted that "[t]he evidence . . . indicates that [an] unprecedented number of workers will die from asbestos-related cancer." Pet. App. 56a. Respondents argued to the jury here that their punitive damages verdict against Owens-Illinois should reflect the entire harm supposedly caused by Owens-Illinois' conduct: "And these men died by the thousands, and there's going to be a bunch more of them. We're not through yet with the companies ignoring the danger and the risk. *That's why punitive damages.*" *Id.* 112a. "Thousands of men have died from a disease that could have been prevented if . . . these companies would have done what they should have done." *Id.* 113a.

Obviously, both the West Virginia court in *TXO Production* and the Texas court below in this case regard the actual or potential harm to others as a relevant consideration in fixing the amount of punitive damages to be mulcted from a tortfeasor. Yet this plainly implies that a single award of punitive damages for a given course of conduct reflects the *entire sum* necessary to achieve the goals of punishment and deterrence that this Court approved in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991). This is especially true where, as both here and in *TXO Production*, the plaintiff urges the jury to consider the harm to others, and the appellate court takes the harm to others into explicit account.

If a single award, or a number of awards, have been rendered for a given course of conduct, and the amount

of these awards are justified on the basis of harm to others besides the plaintiffs, then due process should require some explicit appellate review of the level of punishment to ensure the amount does not exceed that necessary for the goals of punishment and deterrence. Indeed, Alabama law, as approved in *Haslip*, requires consideration of "the existence of other civil awards . . . for the same conduct, these . . . to be taken in mitigation." 111 S. Ct. at 1045.

One thing is certain: there was no such review by the Texas courts in this case, despite Owens-Illinois' demand for it at each step on the way to this Court.

Although they urged the jury to consider that "all these people [i.e., Owens-Illinois] did was . . . [to] kill thousands of people," Pet. App. 113a,[1] Respondents *now* make the astounding claim that: "These punitive damage awards . . . have been *specifically related to an individual plaintiff*. No recovery was ever made on behalf of all that are harmed, nor could such an award be assessed." Brief in Opposition at 21 (emphasis added). This is moonshine. Respondents told the jury repeatedly to consider the harm to thousands of others in assessing punitive damages, and they introduced expert testimony to support that argument. Pet. App. 109a-111a. Having asked the jury to assess punitive damages for the entire consequences of a single course of conduct, Respondents cannot now claim that the $5 million punitive damages award in this case was strictly limited to the plaintiffs sitting in that one courtroom in Rusk County, Texas.

In support of its post-trial motions, Owens-Illinois submitted a detailed affidavit showing the previous punitive

[1] While it is not at issue in this petition for certiorari, Owens-Illinois notes that it manufactured a single type of product that contained approximately 15% asbestos. It manufactured this product in commercial quantities for approximately a decade, ending in April 1958—35 years ago. Many juries return defense verdicts for Owens-Illinois in asbestos cases. The assertions in Respondents' jury arguments are untrue and outrageous.

damages awards against it and stating that these awards had been based on the same course of conduct that was the subject of the trial in this case. Pet. App. 89a.[2] Although the *Pool* Respondents complain that they had "no way to verify the accuracy" of this affidavit, Brief in Opposition at 9, they never contested the statements in the affidavit in the Texas courts and never sought any discovery to test it. Similarly, the Respondents assert that "there is no evidence in the record now before this Court proving that the transgressions of [Owens-Illinois] in this case are the same that occurred in any other case." *Id.* at 6-7. Yet they ignore the clear, sworn statement of that precise fact in Owens-Illinois' affidavit. Pet. App. 91a ("The punitive damage verdict in this case is based upon substantially the same or similar conduct by Owens that is the basis for the punitive damage verdicts in the cases referred to in Paragraph 7 above."). Respondents never controverted this statement in Owens-Illinois' affidavit.

4. The writ of certiorari should be granted and this case remanded for further consideration in light of this Court's eventual decision in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted,* 113 S. Ct. 594 (1992).

Respectfully submitted,

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April 30, 1993

[2] Owens-Illinois' affidavit is dated in November 1989. In the years since then, it has been subjected to additional punitive damages awards. At least five of these additional awards are reflected in reported decisions, *see* Petition for Certiorari at 11, and are subject to judicial notice.